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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 - 1320

EDWARD V. HANRAHAN, JOHN P. MEADE, JOHN MULCHRONE, DANIEL R. GROTH, JOHN CISZEWSKI, WILLIAM CORBETT, RAYMOND BRODERICK, JOSEPH F. GORMAN, GEORGE W. JONES, EDWARD T. CARMODY, AND JAMES DAVIS,

Petitioners,

vs.

PEOPLE ex rel. BARNABAS F. SEARS, AS SPECIAL STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,

and

BECAUSE OF SUPREME COURT RULE 21(4) RICHARD JALOVEC, CHARLES KOLUDROVIC, JOHN SADUNAS AND HON. PHILIP J. ROMITI, JUDGE OF THE CRIMINAL DIVISION OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Edward V. Hanrahan, John P. Meade, John Mulchrone, Daniel R. Groth, John Ciszewski, William Corbett, Raymond Broderick, Joseph F. Gorman, George W. Jones, Edward T. Carmody and James Davis, Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on December 17, 1971, rehearing denied on January 14, 1972.

OPINION BELOW

The opinion of the Supreme Court of Illinois for which review is sought (R. 12) is reported in 50 Ill. 2d 51, 277 N.E. 2d 705, and is printed in the Appendix A hereto. The opinion of the trial court (R. 3, Pages V1-45) granting Petitioners' motion for a hearing, is not reported. This opinion is printed in the Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois sought to be reviewed was dated and entered on December 17, 1971. A timely petition for rehearing filed on January 6, 1972 was denied on January 14, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The federal questions sought to be reviewed were timely and properly raised by your petitioners and were submitted to the Supreme Court of Illinois.

QUESTIONS PRESENTED

I

Whether 14th Amendment standards of due process and equal protection apply to state grand jury proceedings where state law requires indictment by grand jury? If so, whether that grand jury must be fair and unbiased?

II

Whether a state court has the duty under the equal protection and due process clauses of the 14th Amendment to afford petitioners the opportunity to demonstrate at a hearing that the grand jury indicting them was biased?

III

A. Whether a state court has the duty under the equal protection and due process clauses of the 14th Amendment to afford petitioners a hearing on the issue of prosecutorial misconduct biasing the grand jury against them where, during the course of the grand jury proceedings, 2 of the jurors complained to the presiding judge about prosecutorial misconduct, and, after the indictment was returned 4 grand jurors give affidavits and statements attesting to such prosecutorial misconduct and there is no other method of proving that alleged misconduct except at a hearing to receive testimony of grand jurors?

B. Whether, under such circumstances, a state court decision denying petitioners such a hearing (where state statute requires such a hearing) renders that statute unconstitutional as construed and applied to petitioners, in violation of their 14th Amendment rights to equal protection and due process?

IV

Whether massive prejudicial publicity (some of which was introduced in evidence before the grand jury by the prosecutor) occurring throughout the proceedings of a grand jury, which was not sequestered and never instructed to avoid or disregard such publicity, violates petitioners' 14th Amendment rights to due process and equal protection?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourteenth Amendment to the United States Constitution:

   "... nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Illinois Constitution of 1970, Article I, Section 12:

   "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy or reputation. He shall obtain justice by law, freely, completely and promptly."

3. Chapter 38, Section 112-6(b), Ill. Rev. Stat. 1971:

   "Matters occurring before the Grand Jury other than the deliberations and vote of any Grand Juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding directs such in the interest of justice."

4. Chapter 38, Section 114-1(c) and (d), Ill. Rev. Stat. 1971:

"(c) If the motion [to dismiss the indictment] presents only an issue of law the court shall determine it without the necessity of further pleadings. If the motion alleges facts not of record in the case, the State shall file an answer admitting or denying each of the factual allegations of the motion.

(d) When an issue of fact is presented by a motion to dismiss and the answer of the State, the Court shall conduct a hearing and determine the issues."

STATEMENT OF THE CASE

Petitioner, EDWARD V. HANRAHAN, is the elected State's Attorney of Cook County, Illinois; the remaining petitioners are police officers. Petitioners were indicted by a Special Cook County grand jury and charged with conspiracy to obstruct justice as a result of the police officers' search of a Black Panther apartment pursuant to a valid search warrant. Prior to the return of the indictment, the press reported that the special prosecutor had pressured and exhorted the grand jury to vote a true bill after no bills had been voted the preceding day. Thereafter, certain of the petitioners filed pleadings requesting the trial court to investigate the reported misconduct of the special prosecutor before the grand jury. The trial court ordered a hearing. Thereupon the special prosecutor requested the Illinois Supreme Court to bar that hearing. On June 23, 1971 that court ruled that Illinois law requires proceedings before a grand jury be in accordance with due process. It authorized the trial court to determine whether such prosecutorial misconduct had occurred by meeting with the grand jurors *in camera*.

The day after the court rendered its opinion (but before its mandate was issued and before the trial court

could begin its inquiry) the special prosecutor reconvened the grand jury which then reportedly voted not to rescind its prior vote to indict petitioners. On June 25, 1971, an indictment was returned which the trial court ordered sealed pending a hearing on the alleged prosecutorial misconduct in accordance with the Supreme Court opinion of June 23, 1971. On June 30, 1971 the grand jury returned four no bills finding no probable cause to charge petitioners with any crime of violence during or after their search of the Black Panther apartment or with the crime of official misconduct.

Thereupon the special prosecutor again requested the Illinois Supreme Court to bar the hearing ordered by the trial court. On August 24, 1971, the Illinois Supreme Court ordered that the sealed indictment be opened directing that petitioners now follow post-indictment procedures prescribed by the Illinois Criminal Code. As a consequence, the hearing provided by the June 23, 1971 opinion of the Illinois Supreme Court on the issue of alleged prosecutorial misconduct before the grand jury was never held.

Following application to the trial court petitioners received authorization to interview the grand jurors. Petitioners obtained affidavits from three grand jurors and the signed statement of another grand juror all detailing misconduct by the special prosecutor before the grand jury. Among the specific acts charged are:

1) That when the jury returned on April 21, 1971, after having voted no bills the day before, ". . . Mr. Sears came in and first said, 'I'm not going to make the same mistake I made yesterday' ". Thereupon, the indictment prepared in advance and tendered to the jury was read to them, Mr. Sears explaining evidence and giving reasons to indict petitioners.

2) That "Mr. Sears would tell the jurors that the only way to see it is that the police and State's Attorney were guilty."

3) That the special prosecutor said, "If there was just a slight possibility of guilt, we should vote a true bill and he also said that in his opinion, the evidence was overwhelming".

4) That Mr. Sears told the grand jurors: "An indictment is nothing but a piece of paper".

5) That "Mr. Sears gave us reasons why he thought we should indict for over an hour".

6) That "Mr. Sears would frequently go off the record while witnesses were testifying by giving hand signals to the court reporter".

7) That "Mr. Sears told the jurors that 'Judge Power was wrong' ".

8) That Mr. Sears told the grand jurors that (contrary to their instructions from Judge Power to investigate all persons for possible criminal conduct) "the targets of the investigation were the State's Attorney's Police, the State's Attorney and the Chicago Police Department".

9) That "The grand jury didn't decide what indictments it wanted to vote upon; the grand jury voted on all indictments Mr. Sears wanted us to vote on"

10) That a member of Mr. Sears' staff, Special Assistant State's Attorney Savage, designated a witness before the grand jury as a "whore, slut and a liar" after having the court reporter go off the record.

11) That Mr. Sears told the grand jurors what witnesses' testimony was important and what witnesses' testimony was not important and did so off the record.

12) That Mr. Sears refused to produce his investigator, Jack Clark, and former Special Agent-in-Charge, Marlin Johnson, of the FBI as witnesses before the grand jury, although their testimony was requested by some of the grand jurors, and then told the grand jurors that the testimony of those witnesses was not important.

13) That Mr. Sears told the grand jurors "that the only way to see it is that the police and the State's Attorney were guilty".

14) That Mr. Sears told the grand jurors that if there was just a slight possibility of guilt they should vote a true bill.

15) That Mr. Sears told the grand jurors that in his opinion the evidence was overwhelming and they should vote an indictment.

16) That Mr. Sears told the grand jurors that they had done a bad job on April 20, 1971 and scolded them for voting no bills on that date.

17) That Mr. Sears told the grand jurors, after explaining counts of the indictments presented to the grand jury on April 21, 1971, "Now you do what you want, but how, how can you see this any different way".

18) That Mr. Sears told the grand jurors that an indictment didn't do anybody any harm because if the people named were not guilty they would be found not guilty on a trial.

19) That Mr. Sears told the grand jurors on April 21, 1971, after they had deliberated and voted a true bill, "I want to commend you on your good work today".

There are numerous other allegations of misconduct by the special prosecutor before the grand jury. See Appendix C.

Most of the prosecutorial misconduct before the grand jury complained of here occurred when no court reporter was present (at the direction of the prosecutor and contrary to the express instructions of the trial judge that a court reporter be present at all times). Consequently, in the absence of a complete record, the only manner in which the petitioners could inquire into the prosecutor's conduct and prove improper influence in violation of constitutional standards of due process was through the testimony of the grand jurors themselves.

A barrage of publicity occurred concerning the proceedings in this case. As an example, during April and May, 1971, headlines appeared saying:

"Panther Prober Rips Judge";

"Panther Prober Rips Meddling of Judge";

"Hear Raid Jury Votes to Indict Hanrahan, Others";

"Prosecutor Hits Judge for Tactics with Jury";

"Report Jurors Vote to Indict Hanrahan";

"Panther Case Prober Fined for Contempt";

"Judge Rips Sears, Sets Contempt Fine";

"Conduct of Panther Quiz Lashed";

"See Cop's Petition Plot to Kill Panther Grand Jury";

"Hint Panther Jury to Defy Court Edict";

"Bar Hits Bid to Quash Panther Jury";

"Illegal Attempt to Kill Panther Probe Charged".

Similar statements were featured almost daily throughout this period on all Chicago radio and television stations. (R. 8, 10)

At no time was the grand jury sequestered or instructed to avoid or disregard such publicity. On the contrary, the

special prosecutor read some prejudicial press reports to the grand jury.

Petitioners filed motions to dismiss the indictment, in accordance with Illinois statutory procedure, attaching the grand jurors' affidavits and statement, asking the court to set a hearing (*in camera* or in open court) on their contention that the grand jury was biased and prejudiced as a result of the improper conduct of the prosecutor and the attendant prejudicial publicity; and, asking further that, if the court found those contentions to be true, to dismiss the indictment.

The special prosecutor filed a motion to strike the motions to dismiss, attaching counter-affidavits of himself and his assistants denying in substance many of the factual assertions contained in the grand jurors' statement and affidavits aforesaid.

The parties' pleadings presented many unresolved factual issues. Attached hereto is a summary of them, listing 39 facts alleged and denied, 32 facts specifically admitted by the special prosecutor or admitted by inference because unanswered by his counter-affidavit, and 5 facts admitted by him by way of negatives pregnant. (Appendix D.)

The trial court ordered the hearing in accordance with Illinois statutory procedure which requires a hearing to be held on factual issues raised on a motion to dismiss an indictment. (Ch. 38, Sec. 114-1(d), Ill. Rev. Stat., 1971).

The special prosecutor thereupon filed another original action in Prohibition and Mandamus in the Illinois Supreme Court seeking to bar that hearing in the trial court. Whereas in his previous pleadings before that court the special prosecutor argued that legal scrutiny of his conduct before the grand jury could be raised only as a

post-indictment remedy under Illinois statutes, he now contended that *return of the indictment* (which he caused) now precluded such scrutiny altogether.

On December 17, 1971 the Illinois Supreme Court issued its Writ of Mandamus and Prohibition. Thereby, despite the lack of other method of proof (because of the absence of relevant court reporter's transcript), that court refused to allow the hearing requested by petitioners to receive the testimony of the grand jurors on the issue of alleged prosecutorial misconduct before the grand jury. That was the final pronouncement on the issue by the highest state court.

Petitions for rehearing were timely filed and denied on January 14, 1972. Petitioner Hanrahan's Petition for Rehearing raised once again the constitutional issues here presented. (R. 14, reprinted in Appendix E.) The American Civil Liberties Union and the Illinois Public Defenders Association likewise filed petitions for rehearing joining the petitioners herein as *Amici Curiae* seeking reversal of the Illinois Supreme Court opinion. Their petitions were also denied.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Indictment by grand jury only is provided by the law of 28 states and by the federal system. Thus, this case does not involve only the constitutional rights of petitioners. Unless this court strikes down the far-reaching decision of the Illinois Supreme Court, the constitutional right of persons in those 28 states and those persons subject to federal process—to be protected against prosecutorial misconduct before the grand jury—will be jeopardized.

The three Illinois Supreme Court Justices who wrote the dissenting opinion recognized that danger to individual liberty inherent in the majority opinion by stating: "The importance of the question [presented to us] goes far beyond this case." 50 Ill. 2d 51, 68, 277 N.E. 2d 705, 714.

The Illinois decision permits a prosecutor, secretly and outside the presence of a court reporter, to revile a grand jury witness; to exhort grand jurors to indict; to deceive them regarding the law, the evidence and defendants' rights; to argue and offer opinions—all to procure the indictment *he* wants.

If the Illinois decision is allowed to stand, any prosecutor need not fear discovery or accountability for his unlawful conduct—even when some of the grand jurors are so repelled thereby that during the course of the proceedings they complain to the presiding judge, and even though, after return of the indictment, grand jurors give sworn statements detailing such misconduct.

The Illinois decision puts the awesome power of a prosecutor beyond federal constitutional scrutiny. Knowing that his conduct before the grand jury is not subject to such

review, a prosecutor now can do whatever he wants. He can exert any kind of influence upon the grand jurors, who are laymen, in order to procure an indictment. He can make the accused the victim of the very constitutional device which was designed for his protection. Thus, the grand jury now becomes "an engine of oppression" as recognized by the Court of Appeals in *Schmidt* v. *U. S.*:

> "It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious, or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of 'the citizen against the unfounded accusation, whether it comes from the government or be prompted by partisan passion, or private enmity' . . . which it was primarily designed to provide, may become an engine of oppression and a mockery of justice." (115 F. 2d 394, 397).

ARGUMENT

I.

FOURTEENTH AMENDMENT STANDARDS OF DUE PROCESS AND EQUAL PROTECTION OF LAW APPLY TO STATE GRAND JURY PROCEEDINGS.

The Illinois Constitution of 1970 provides, as do 27 other states, that indictment may be only by a grand jury. On June 23, 1971, the Illinois Supreme Court held that under the law of Illinois:

> "... the grand jury is an integral part of the court and not the tool of the prosecutor, and neither the prosecutor nor the grand jury is vested with power to proceed without regard to due process."
>
> • • • • •
>
> "We agree with the statement in *In Re Fried* (2d Cir.) 161 F. 2d 453, that a wrongful indictment inflicts substantial harm on a defendant not entirely remedied by acquittal." *People ex rel Scars* v. *Power*, 49 Ill. 2nd 14, 36, 273 N.E. 2d 380, 392.

Thus, Illinois law requires that indictment be by grand jury only, that grand jury procedure be consistent with due process of law and that neither trial nor acquittal may undo the harm done by a wrongful indictment. In this respect, Illinois follows the requirement of this court announced in *Carter* v. *Jury Commission*, 396 U.S. 320:

> "Once the state chooses to provide grand ... juries, whether or not constitutionally required to do so, it must hew to Federal constitutional criteria. ..."

As to pre-impanelling grand jury procedures, this court has held that the 14th Amendment right to equal protection of laws applies. The *Carter* case involved a grand jury, the composition of which was racially discrimina-

tory. Similarly, Illinois law provides that discriminatory selection of grand jurors violates the 14th Amendment guarantee to equal protection of laws, conforming to federal constitutional standards.

Likewise, this court recognized in *Alexander* v. *Louisiana*, 40 LW 4365, (decided April 3, 1972) that as long as 80 years ago (*Neal* v. *Delaware*, 103 U.S. 370) the equal protection clause of the 14th Amendment was made applicable to a state which chose to provide grand and petit juries. Therefore, 14th Amendment principles of due process and equal protection of the law have been held to apply to grand jury pre-impaneling procedures.

This court has twice considered the application of the 14th Amendment to state grand jury proceedings *after* impaneling: *Costello* v. *U.S.*, 350 U.S. 359 and *Beck* v. *Washington*, 369 U.S. 541.

With respect to post-impaneling grand jury procedures, this court has found that one elementary standard of due process of law is that the accused be afforded a fair and unbiased grand jury. (*Costello* v. *U.S., supra*). In *Costello*, the indictment was challenged on the ground that there was insufficient evidence presented to the grand jury to warrant indictment. This court held that even though the evidence presented before the grand jury was hearsay, it was sufficient. However, the basic assumption expressed by the opinion was that the jury must be "unbiased" (at p. 363). In a separate concurring opinion Justice Burton sets forth one of the requisites of due process and equal protection of the law in grand jury proceedings:

> "I assume that this court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment." 350 U.S. 359, 364.

Thus, federal constitutional standards of due process of law require that a grand jury be unbiased in its proceedings. This concept — application of due process — was expressly recognized and confirmed by the first Illinois Supreme Court decision in this case of June 23, 1971, as noted above.

This court also considered in *Beck, supra,* the application of due process and equal protection of law with respect to state post-impaneling grand jury procedures. In *Beck,* this court found that there was no showing that Washington had failed to furnish defendant a fair grand jury. By examining the facts to reach its conclusion, this court inferred that a defendant indicted by a grand jury had a constitutional right to have that grand jury be fair. Despite its examination of the facts and despite that inference, this court expressly stated that it was not deciding that constitutional issue. However, that very constitutional issue is now presented by this case.

The Illinois Supreme Court by its June 23, 1971 opinion recognized that due process applies to grand jury proceedings and therefore they must be fair. Here, petitioners (by grand jurors' affidavits and statement) have alleged that the grand jury indicting them was not fair. The special prosecutor has denied those allegations, thus creating a factual issue.

Despite a statutory procedure specifically designed to resolve that factual issue (Chap. 38, Section 114-1(d), Ill. Rev. Stats., 1971) and despite the clear inference of the *Beck* case that the 14th Amendment requires a fair grand jury, the Illinois Supreme Court has refused to allow petitioners a hearing for the purpose of showing those constitutional rights were violated.

The direct presentation here of the constitutional issue specifically not resolved by the court in the *Beck* case, and the refusal of the Illinois Supreme Court to implement here the constitutional guarantee of due process in grand jury proceedings recognized by its June 23, 1971 opinion, provides this court with the opportunity to declare the constitutional principle it inferentially recognized in the *Beck* case: that a defendant indicted by a grand jury has a constitutional right to have that jury be fair, unbiased and uninfluenced by prosecutorial misconduct.

II

FAILURE OF THE ILLINOIS COURTS TO PROTECT PETITIONERS FROM BEING INDICTED BY A BIASED AND PREJUDICED GRAND JURY WAS A DENIAL TO PETITIONERS OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Illinois law (Chapter 38, Section 112-2(c), Ill. Rev. Stat., 1971) requires grand jurors to be unbiased. Likewise, the decisions of the Illinois Supreme Court have consistently recognized that grand juries must be unbiased. *Gitchell* v. *People,* 146 Ill. 175, 187; *People* v. *Hartenbower,* 283 Ill. 591, 602, 603, 608; *People* v. *Jameson,* 387 Ill. 367, 374; *People* v. *Petruso,* 35 Ill. 2d 578. Lack of bias by a grand jury is fundamental to fulfillment of its historical function:

> ". . . Historically, this body [the Grand Jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of

> standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." (*Wood* v. *Georgia,* 370 U.S. 375, 390).

That is the very reason that Illinois and 27 other states along with the Federal Government use the grand jury system. In the words of Justice Stewart: "The prime value of the grand jury has always been its independence from the judiciary and the prosecution." *Branzburg* v. *Hayes,* Sup. Ct. No. 7-85, 40 Law Week 3407 (during oral argument, pending).

The record amply establishes sufficient grounds for petitioners' motion to dismiss the indictment because the grand jury was biased against them as the result of the prosecutor's misconduct and massive prejudicial publicity. These grounds are so compelling that it became the constitutional duty of the Illinois Court to order interrogation of the grand jurors and to examine the enormous scope of the publicity, as asked by petitioners.

Thus, during the course of the grand jury proceedings and on their own initiative, two grand jurors complained to the presiding judge concerning the conduct of the prosecutor. Later, in affidavits and statement (Appendix C), filed with the court after the return of the indictment, four grand jurors charged the special prosecutor with prejudicial misconduct before the grand jury. Some examples of that misconduct are detailed above (Statement of the Case).

The dissenting opinion of three judges of the seven member Illinois Supreme Court detailed some of the prosecutor's aberrant conduct:

> "[The affidavits and statement] charge that the Special State's Attorney frequently went off the record and made derogatory comments with respect to the veracity of some of the witnesses, that one of his assistants referred to a witness as a 'whore, a slut and a liar,' that the Special State's Attorney expressed the opinion that the evidence of guilt was 'overwhelming', that he 'scolded' the grand jury for voting no bills on the preceding day, that when one of the grand jurors stated that an indictment was a very serious thing, the Special State's Attorney said, 'Don't worry, an indictment is nothing but a piece of paper.' It is also said that he stated that an indictment did not do anybody any harm because if the people named were not guilty they would be found not guilty at trial." *People ex rel Sears* v. *Ronaiti*, et al, 50 Ill. 2d 51, 67, 68, 277 N.E. 2d 705, 713."

In jurisdictions throughout the United States prejudicial misconduct by a prosecutor before a grand jury has, upon proper showing, consistently been held to be a basis for dismissal of an indictment because fundamental constitutional safeguards were violated. See: *In re Fried*, 161 F. 2d 453, *U.S.* v. *Wells*, 163 F. 313; *U.S.* v. *Farrington*, 5 F. 343, 347; *Commonwealth* v. *Kilgallen*, 108 A. 2d 780 (Pa.); *Commonwealth* v. *Smart*, 84 A. 2d 782 (Pa.); *U.S.* v. *A.M.A.*, 26 F. Supp. 429; *State* v. *Good*, 460 P. 2d 662; *Attorney General* v. *Pelletier*, 134 N.E. 407 (Mass.); *Hammers* v. *State*, 337 P. 2d 1097 (Okla.); *U.S.* v. *DiGrazia*, 213 F. Supp. 232; *U.S.* v. *Kilpatrick*, 16 F. 762.

The damage done petitioners by the prosecutorial misconduct charged by the grand jurors must be measured in context with the hostile and prejudicial publicity against petitioners which saturated Cook County preceding and during the grand jury proceedings.

Following are some of the hundreds of such headlines:

"Panther Prober Rips Judge"

"Panther Prober Rips Meddling of Judge"

"Hear Raid Jury Votes to Indict Hanrahan, Others"

"Prosecutor Hits Judge for Tactics with Jury"

"Report Jurors Vote to Indict Hanrahan"

"Panther Case Prober Fined for Contempt"

"Judge Rips Sears, Sets Contempt Fine"

"Conduct of Panther Quiz Lashed"

"See Cop's Petition Plot to Kill Panther Grand Jury"

"Hint Panther Jury to Defy Court Edict"

"Bar Hits Bid to Quash Panther Jury"

"Illegal Attempt to Kill Panther Probe Charged"

The very nature and volume of that publicity required the prosecutor and the trial court to protect petitioners from the inevitable bias created thereby. Since the prosecutor argued in court that the Judge didn't have supervisory powers over the Grand Jury, the law required him to have carefully instructed the grand jurors to disregard all publicity. As that publicity increased and intensified, he should have caused the grand jurors to be sequestered. Cf. *Sheppard* v. *Maxwell*, 384 U.S. 333. He did neither.

The massive publicity alone was sufficient grounds for holding that the grand jury was tainted beyond constitutionally permissive standards of this court. *Sheppard* v. *Maxwell*, 384 U.S. 333; *Estes* v. *Texas*, 381 U.S. 532.

Under any circumstances, a fair review of the record shows that the affidavits and statement of the four grand jurors, as well as the massive prejudicial publicity, create

a clear *prima facie* case of prejudicial influence upon the grand jury.

The Illinois Supreme Court, nevertheless, refused to grant petitioners' request that the grand jurors be examined in open court or *in camera* to ascertain the truth concerning the prosecutor's misconduct before the grand jury. It did so on the ground that secrecy of the grand jury must be maintained after indictment. That decision completely frustrated and abrogated petitioners' constitutional rights to an unbiased, objective grand jury in as much as there was no way to prove prosecutorial misconduct without questioning the grand jurors. The court denied petitioners a hearing despite its prior opinion in this very same case (*People ex rel Sears* v. *Power,* 49 Ill. 2d 14) where it held that such *in camera* investigation of the grand jurors was proper in the pre-indictment stage to ascertain the truth with respect to the charges of prosecutorial misconduct. That opinion recognized that not only must the grand jury be impartial and uninfluenced under Illinois law, but also that during the pre-indictment stage due process imposes a duty upon Illinois judges to protect an accused from being tried on an indictment returned by prejudiced grand jurors.

The constitutional requirement that a grand jury be fair and unbiased is not diminished because an indictment has been returned by it. Similarly, the reasons for secrecy of the grand jury proceedings are no more compelling *after* an indictment than before it. Thus, for the Illinois Supreme Court to distinguish between persons who have been indicted and those not yet indicted—and to assure a fair, unbiased grand jury to the latter but not to the former—is arbitrary and contrary to 14th Amendment rights to due process and equal protection. That is the exact defect of the Illinois Supreme Court opinion here and, therefore, that is the compelling reason for this court to reverse it.

In fact, the need for affording petitioners that constitutional protection — by providing them the hearing they requested — is obviously far greater, since they have already been indicted; and, it is clear that the stain of an indictment is often not removed by acquittal. *In re Fried*, 161 F. 2d 453.

Petitioners could show that their constitutional right to an unbiased grand jury had been violated only by requesting a hearing at which the charges of prosecutorial misconduct before the grand jury could be established. Such a hearing was necessary because the special prosecutor had directed the court reporter not to be present on most of the days the misconduct allegedly occurred, even though the Presiding Judge had specifically ordered that a court reporter be present at all times except during the grand jury's deliberation and vote. The Illinois Supreme Court's opinion, however, denied petitioners such a hearing. It prohibits use of grand jurors' testimony to prove prosecutorial misconduct before the grand jury and provides no method of substituted proof. Thus, petitioners have been deprived of any means of establishing their claim that their constitutional rights were denied.

All the petitioners seek is a hearing and a judicial determination of whether prosecutorial misconduct did occur as alleged by four grand jurors; and, if so, whether such misconduct was sufficient to invalidate the indictment as having emanated from a biased grand jury, in violation of petitioners' 14th Amendment rights.

Under identical circumstances, federal courts have afforded the exact relief petitioners seek here. Thus, in *U.S. v. Bullock*, 448 F. 2d 728, as a matter of federal constitutional right, the court ordered a hearing to determine

what occurred before the grand jury because there was no transcript of grand jury proceedings available.

Illinois law (Ch. 38, Section 114-1(d), Ill. Rev. Stat. 1971) provides a hearing to resolve such disputed issues of fact presented on motions to dismiss an indictment. However, by its opinion of December 17, 1971, the Illinois Supreme Court denied petitioners that hearing, thereby denying petitioners equal protection of that law.

Illinois law (Ch. 38, Section 112-6(b), Ill. Rev. Stat. 1971) also provides that the "Matters occurring before the Grand Jury . . . may be disclosed . . . in the interests of justice." Petitioners predicated their request for a hearing on the four grand jurors' charges of prosecutorial misconduct on that statute as well, noting that the trial court had found such disclosure of the grand jurors' testimony was required "in the interests of justice". (Trial court opinion, Appendix B). By its opinion of December 17, 1971, the Illinois Supreme Court denied petitioners the hearing provided by that statute and thereby denied petitioners equal protection under that law as well.

That ruling of the Illinois Supreme Court thus renders Illinois law, Ch. 38, Sections 112-6(b) and 114-1(d), Ill. Rev. Stats. 1971, invalid and unconstitutional as construed and applied in this case because that opinion violates petitioners' right to due process and equal protection. That opinion leaves petitioners with no remedy available to assert and prove a constitutional defect in the indictment, contrary to the dictates of due process and equal protection. *People* v. *Glenn*, 173 N.Y. 395; *U.S.* v. *Bullock*, 448 F. 2d 728.

That decision also deprived petitioners of the remedy guaranteed them by the Illinois Constitution of 1970, which provides in Article 1, Section 12: "Every person shall find

a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly."

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The PEOPLE ex rel. BARNABAS F. SEARS,
Special State's Attorney, Petitioner,

v.

Philip ROMITI, Judge, et al., Defendants.

No. 44781.

Supreme Court of Illinois.

Dec. 17, 1971.

As Modified on Denial of Rehearing
Jan. 14, 1972.

SCHAEFER, Justice:

This case again presents questions arising in connection with the Special Grand Jury convened by the circuit court of Cook County to investigate violations of law by persons involved in what has come to be known as the Black Panther raid, which took place in December of 1969. The circumstances under which the grand jury was convened and many of the earlier proceedings are described in our opinion in People v. Sears and People ex rel. Sears v. Power which were consolidated by this court and are reported in 49 Ill. 2d 14, 273 N.E. 2d 380.

The first of those cases was an appeal from two orders holding Barnabas F. Sears, the Special State's Attorney appointed by the circuit court, in contempt of court. The order which held him in contempt for refusing to subpoena witnesses as directed by the trial court was reversed, and the order which held him in contempt for statements made outside the courtroom was reversed and remanded for a hearing. The second case was an original action of *mandamus* and prohibition brought by the spe-

cial State's Attorney against the Honorable Joseph A. Power, presiding judge of the criminal division of the circuit court of Cook County. The conclusions reached by the court in that case appear in the following excerpts from the opinion:

> "It is the opinion of the majority of this court that the circuit court, in the exercise of its inherent supervisory powers over the grand jury has jurisdiction to order the transcript of the proceeding before the grand jury submitted to it for examination as provided in the order entered on May 17, 1971, and we so hold. The petition for a writ of *mandamus* is, therefore, denied.
>
> "With respect to the circuit court's announcement of his availability to those jurors who wish to communicate with him privately, it is our opinion that such procedure is not desirable and presents the possibility of infringement upon the historic independence of the grand jury and its proceedings. We hold that the court has jurisdiction to meet *in camera* with the grand jury. Insofar as the petitioners seek a writ of prohibition to preclude *in camera* communication between the court and individual grand jurors, the writ of prohibition will issue, and in all other respects the petition for writ of prohibition is denied." 49 Ill. 2d 14 at 36, 273 N.E. 2d 380 at 392.

Our opinion was handed down on June 23, 1971. On the following day the grand jury met and voted not to rescind an indictment which it had previously voted on April 21, 1971. On June 25, that indictment, sealed in accordance with the court's order, was returned in the circuit court. On August 24, 1971, after another original action (No. 44586) had been filed in this court by the special prosecutor against the presiding judge, to compel the opening of the indictment, it was opened. The indict-

ment charged Edward V. Hanrahan, State's Attorney of Cook County, Richard Jalovec, an assistant State's Attorney, and 12 police officers with conspiracy to obstruct justice.

By oral statements on August 31, 1971, after the special grand jury had been discharged, the presiding judge gave the defendants permission to interview members of the special grand jury except concerning deliberations and the vote of any juror. The presiding judge then assigned the case to Judge Philip Romiti.

Pursuant to the authorization of the presiding judge, with which Judge Romiti declined to interfere, the attorneys for the defendants obtained an unsworn statement from one grand juror and a transcript in question and answer form from another, who swore to the truth of his answers. Two other grand jurors signed affidavits stating that if they were asked the same questions their answers would be the same. Motions to dismiss the indictments were filed, to which the statement and affidavits were attached. The Special State's Attorney and his assistants filed counter-affidavits, and on October 22, 1971, Judge Romiti ordered that a hearing be held to determine the truth of the matters charged in the statement and affidavits, and delivered an opinion explaining the reasons for his ruling. This original action, seeking a writ of prohibition to bar the hearing and a writ of *mandamus* to compel the vacation of the order setting the matter for hearing, was then filed by the Special State's Attorney.

[1] At the outset we encounter the contentions of the defendants that this case is not an appropriate one for the exercise of original jurisdiction and that in any event *mandamus* and prohibition do not lie in the circumstances

here presented. Running through both contentions are the propositions, first, that the extraordinary writs raise only questions concerning the jurisdiction of the trial court, and, second, that these writs should not be permitted to be used as substitutes for appeals. As general statements, both propositions are sound. But as pointed out in our earlier opinion in this matter, "This court, however, charged with the supervisory and administrative powers and duties provided in the constitution, may, when approriate, award these writs even though all of the normal criteria are not present. People ex rel. General Motors v. Bua, 37 Ill. 2d 180, 192, 226 N.E. 2d 6; People ex rel. Continental Air Transport Co., Inc. v. Strouse, 41 Ill. 2d 567, 570, 244 N.E. 2d 171." People v. Sears (1971), 49 Ill. 2d 14, 33, 273 N.E. 2d 380, 390; see also, People ex rel. Terry v. Fisher, 12 Ill. 2d 231, 145 N.E. 2d 588.

[2] The primary question raised in this case is whether a trial court may conduct a hearing to receive the testimony of grand jurors concerning charges that relate to the demeanor of a prosecutor while examining witnesses before the grand jury and to the quality of his argument or advice to them. Charges of this type have been leveled against the prosecutor by the indicted defendants in this case in connection with their motions to quash the indictment, and in our opinion the importance of the question justifies the exercise of original jurisdiction of this Court.

There has been an increasing tendency in criminal cases to try some person other than the defendant, and some issue other than his guilt. What was stated by Mr. Justice Black in Costello v. United States, in rejecting the contention that an indictment is open to challenge because only hearsay evidence was presented to the grand jury, is pertinent here. "If indictments were to be held open

to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." 350 U.S. 359, 363, 76 S. Ct. 406, 408, 100 L. Ed. 397, 402.

It is important, therefore, that we analyze carefully the statute and the judicial decisions that are relied upon to authorize such a proceeding. As the trial judge pointed out in his opinion, prior to the 1965 amendment of section 112-6(b) of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 112-6), "previously existing case law in Illinois exhibited the philosophy that the secrecy of the grand jury could only rarely, if ever, be invaded. The classic statement of this line of holding can be found in Gitchell v. People." In that case the court stated: "In furtherance of justice, and upon grounds of public policy, the law requires that the proceedings of grand juries shall be regarded as privileged communications, and that the secrets of the grand jury room shall not be revealed. * * * The hardship which an accused party may suffer because he is not allowed to go behind an indictment to see how it has been found will be small, compared with the incalculable mischief which will result to the public at large from a disclosure of what the law deposits in the breast of a grand juror as an inviolable secret. An innocent person will not be hurt by being forbidden to thus go behind the indictment, 'for he can always vindicate himself in a trial upon the merits.'" Gitchell v. People (1893), 146 Ill. 175, 183, 185, 33 N.E. 757, 759.

Concerning section 112-6(b), the trial court stated:

> "Prior to the 1965 amendment, Section 112-6(b) limited disclosure to transcripts of the testimony of the witnesses to be used by the state at trial. In 1965, the Legislature broadened disclosure to cover all situations. By broadening the scope and availability of disclosure, the amendment tacitly recognized the policy, the current trend and modern view, that once an indictment is returned, the rationale underlying and the compelling reasons calling for the maintenance of secrecy are at an end.
>
> "The Committee Comments relating to this section of the Criminal Code are of great value for the reason that the revised provisions of Section 112-6, relating to this topic, have not been passed upon by the Illinois Courts of Review, and no case, to this court's knowledge, exists in Illinois interpreting this provision. The Committee Comments expressly state and refer to a related rule contained within the Federal Rules of Criminal Procedure, to-wit, Rule 6(e). The similarity between the Federal rule and the Illinois provision is strong and it seems obvious that Illinois has been brought into line with modern Federal procedures in this regard."

As the trial court indicated, the case for allowing the kind of preliminary inquiry that is here involved rests basically on section 112-6(b) of the Code of Criminal Procedure. The meaning of this statutory provision was not discussed in the briefs of the parties in the earlier case, and it is mentioned only in passing in the opinion of this court. (49 Ill. 2d 14, 34, 273 N.E. 2d 380.) As the trial court stated, there are no decisions interpreting it.

When the Code of Criminal Procedure was originally enacted in 1963, section 112-6(b) provided: "When the State uses, for the purpose of examining any witness, any

part of a transcript of matters occurring before the Grand Jury, that portion of the transcript may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice." This provision was concerned with the use of transcripts of grand jury proceedings for impeachment purposes at trial. It was not included in the draft of the Code submitted to the General Assembly, and its validity was sharply questioned. (See, Calkins and Wiley, "Grand Jury Secrecy Under the Illinois Criminal Code—Unconstitutional," 59 Nw. L. Rev. 577 (1964); see also, People v. Johnson (1964), 31 Ill. 2d 602, 203 N.E. 2d 399.) The basic constitutional objection concerned the absolute control which the statute gave to the prosecution over access to the testimony of witnesses before the grand jury for purposes of impeachment.

Section 112-6(b) was amended in 1965, apparently in an effort to remove this ground of criticism. It now reads: "Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice." That the amended provision was also concerned with the disclosure of testimony before the grand jury for purposes of impeachment or discovery appears from this court's Rule 412, which relates to discovery before trial in criminal cases and became effective October 1, 1971. In pertinent part this Rule states that "• • • the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control: • • • (iii) a transcript of those portions of grand jury minutes concerning testimony of the accused and relevant

testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." The Committee Comments state: "Paragraph (a), subparagraph (iii), adopts the A.B.A. Standard for production of grand jury minutes. In terms of Illinois practice it makes mandatory disclosure of what is now discretionary under the second sentence of section 112-6(b) of the Code of Criminal Procedure."

The Federal Rules of Criminal Procedure were adopted in 1946. Rule 6(e) of those Rules differs sharply from the Illinois statute, in that it expressly authorizes disclosure upon a showing "that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Since the Federal Rule was the model for the Illinois provisions, the omission of a comparable provision authorizing disclosure in connection with a motion to dismiss an indictment is significant. Moreover, so far as we have been able to ascertain, no Federal court has held that Federal Rule 6 authorizes the use of affidavits of grand jurors, or their testimony, in connection with an attack upon the validity of an indictment on the ground of misconduct of the prosecutor. After noting the absence of Federal decisions in this area, one treatise on Federal procedure concludes: "Thus, the conduct of the prosecution in obtaining an indictment is virtually unreviewable." 8 Moore, Federal Practice, Sec. 6.04 at 6-22. See also 1 Wright, Federal Practice and Procedure, Sec. 108.

[3] For the reasons indicated we are of the opinion that section 112-6(b) does not authorize the kind of hearing proposed to be conducted by the trial court. As has been stated, the previous decisions of this court do not sanction such a hearing. Nor are we persuaded to initiate

the procedure here sought to be employed by the scattered and sporadic decision of other courts which are relied upon to justify the use of affidavits or testimony of grand jurors to show misconduct during grand jury proceedings.

Three of those decisions, United States v. Farrington (N.D. N.Y. 1881), 5 F. 343; United States v. Kilpatrick (W.D. N.C. 1883), 16 F. 765; and United States v. Wells (D. Ida. 1908), 163 F. 313, were by single Federal judges. The first two involved the use of affidavits or testimony of grand jurors to show the presence before the grand jury, and the conduct, of persons having no official connection with the proceeding. In the *Wells* case, characterized as "extraordinary" by the United States Court of Appeals for the Third Circuit in United States v. Bruzgo (1967), 373 F. 2d 383, affidavits and testimony of grand jurors were received on the defendant's motion to quash an indictment because of misconduct of the prosecutor before the grand jury. Of the cases decided by reviewing courts, in State v. Will (1896), 90 Iowa 58, 65 N.W. 1010, the Supreme Court of Iowa held that affidavits of grand jurors were competent to show that the judge entered the grand jury room and directed the indictment of named persons, including the defendant. In State v. Kifer (1937), 186 La. 674, 173 So. 169, the Supreme Court of Louisiana held that grand jurors might properly testify that the prosecutor was present during the deliberations of the grand jury. State v. Manney (1957), 24 N.J. 571, 133 A. 2d 313, involved the use of affidavits to establish the presence of an allegedly unauthorized person before the grand jury. In Attorney General v. Pelletier (1922), 240 Mass. 264, 134 N.E. 407, the testimony of grand jurors was held to have been properly received in an action brought by the Attorney General to remove a local prosecutor from office on charges that he had not properly performed his

duties—specifically that he had sought leniency for a friend.

The strictness with which this court has previously enforced the rule against the use of affidavits of grand jurors is demonstrated by People v. Arnold (1910), 248 Ill. 169, 171-172, 93 N.E. 786, 787. There the court said: "There was a motion to quash the indictment on the ground that Alta Rosenstiel and her father and mother were all present in the grand jury room at the same time. The proceedings before a grand jury must be kept strictly secret, and that could not be done if witnesses should be present during the examination of each other. The rule, therefore, is that one witness must never be permitted to be present at the examination of another. 17 Am. & Eng. Ency. of Law (2d Ed.) 1204. The court refused to consider the affidavits of grand jurors with reference to the alleged fact, and did not thereby commit error. Gitchell v. People, 146 Ill. 175, 33 N.E. 757, 37 Am. St. Rep. 147."

It is undisputed that the indictment in this case was prepared before the grand jurors had determined to indict. Section 112-4 of the Code of Criminal Procedure provides: "(c) If 12 grand jurors concur that the evidence before them constitutes probable cause that a person has committed an offense the State's Attorney shall prepare a Bill of Indictment charging that person with such offense." (Ill. Rev. Stat. 1969, ch. 38, par. 112-4.) The defendants argue that this provision establishes a time sequence which must be adhered to, and "that once a true bill is voted, the indictment then prepared must be submitted to the grand jurors for their approval." And because that time sequence was not adhered to, they argue that the indictment must be dismissed.

Section 17 of the Jurors Act has, since its enactment in 1874, contained the following provisions: "After the grand jury is impaneled, it shall be the duty of the court to appoint a foreman, who shall have power to swear or affirm witnesses to testify before them, and whose duty it shall be, when the grand jury, or any twelve of them, find a bill of indictment to be supported by good and sufficient evidence, to indorse thereon 'A true bill;' where they do not find a bill to be supported by sufficient evidence, to indorse thereon 'Not a true bill;' and shall, in either case, sign his name as foreman, at the foot of said endorsement, and shall also, in each case in which a true bill shall be returned into court as aforesaid, note thereon the name or names of the witness or witnesses upon whose evidence the same shall have been found." (Ill. Rev. Stat. 1969, ch. 78, par. 17.) The Code of Criminal Procedure did not amend or repeal this provision. Nor do the Comments of the drafting committee indicate any purpose to alter the procedure it describes.

[4] In our opinion the contention of the defendants is unsound. The "bill" referred to in the expression "true bill" *is* the indictment. The definition of a "bill of indictment" is: "A formal written document accusing a person or persons named of having committed a felony or misdemeanor, lawfully laid before a grand jury for their action upon it. * * * If the grand jury decide that a trial ought to be had they indorse on it 'a true bill;' if otherwise, 'not a true bill' or 'not found.'" Black's Law Dictionary, Revised Fourth Edition.

It cannot be said, we think, that the General Assembly intended, by section 112-4 of the Code, that every indictment prepared before the grand jury has voted that probable cause exists should be held invalid. The highly technical notion that an indictment is invalid unless the

grand jury has voted on the existence of probable cause with no bill of indictment before it is contradicted both by the definition of a "bill of indictment" and the clear indication in the Jurors Act that the indictment is before the grand jury when they vote upon whether or not it is a "true bill."

The defendants also contend that the indictment must be dismissed because of prejudicial publicity. There has indeed been extensive publicity: the indictment is based in part upon the defendants' newspaper interviews and TV re-enactment of occurrences in connection with the execution of the search warrant in this matter, and there has been subsequent publicity about the events that gave rise to the convening of the special grand jury, and about each subsequent occurrence.

While the Supreme Court of the United States has overturned criminal convictions where adverse publicity denied a defendant a fair trial, it has specifically refused to hold that a grand jury indictment may be invalidated on the basis of pre-indictment publicity. (Compare Sheppard v. Maxwell (1966), 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600, with Beck v. Washington (1962), 369 U.S. 541, 546, 82 S. Ct. 955, 8 L. Ed. 2d 98, 105.) It has been pointed out that to permit such a challenge would place a severe strain on the effective administration of criminal justice, while it would do nothing to insure the fair and impartial treatment of defendants at trial. See, Note, 111 U. Pa. L. Rev. 1000 (1963).

The adverse effect of prejudicial publicity upon the trial of a defendant can be eliminated or alleviated by transferring the case for trial in another county. This remedy is unavailable, however, in the case of pre-indictment publicity, for an indictment must be returned by a

grand jury of the county in which the alleged offense occurred. To permit such an attack upon an indictment would tend to immunize persons involved in events upon which the news media concentrated their attention.

[5] Considerations of this kind have led the courts of other States to refuse to permit a defendant to challenge an indictment because of the possible effect of adverse publicity on a grand jury. (Commonwealth v. Monahan (1965), 349 Mass. 139, 154-156, 207 N.E. 2d 29, 39-40; Piracci v. State (1955), 207 Md. 499, 514-515, 115 A. 2d 262, 268-269; State v. Winsett (Super. Ct. Del. 1964), 200 A. 2d 692, 693-694.) That position is sound in our opinion, and we hold that an attack upon a grand jury indictment will not lie upon the ground of pre-indictment publicity. In so doing, we reaffirm the following statement made by this court in People v. Looney (1924), 314 Ill. 150, 155, 145 N.E. 365, 367: "An indictment cannot be quashed because of public sentiment in the community, or of public excitement because open crime has been committed and gone unpunished, or because newspapers or individuals or associations have denounced crime or individuals charged with crime."

For the reasons stated in this opinion, a writ of *mandamus* will issue commanding the trial court to expunge its order granting the defendants a hearing on their challenges to the indictment which are discussed in this opinion, and a writ of prohibition will issue restraining the trial court from taking any action in relation to those challenges to the indictment.

Writs awarded.

GOLDENHERSH, Justice (dissenting):

I dissent from the majority opinion. Clearly, the motion for leave to file the petition was improvidently allowed.

and the petition should be denied. I am aware of our prior decisions holding that writs of prohibition and *mandamus* may be awarded even though all of the normal criteria are not present but they do not support the issuance of the writs in the absence of all of the normal criteria. Historically, these writs are sparingly used and should not be invoked as a piecemeal appeal from an interlocutory nonappealable order which the circuit court admittedly has jurisdiction to enter. I do not in this dissent express any opinion with respect to the validity of the indictment. I simply point out that the decision of the majority has foreclosed, without valid reason, an inquiry germane to the indictment's validity and clearly authorized by statute and our prior decisions.

The majority opinion, it should further be pointed out, is, if not unique, somewhat unusual, in that it rejects the contentions of all the parties and promulgates a rule which renders immune to judicial scrutiny the conduct of a State's Attorney before a grand jury no matter how violative of due process of fundamental fairness. Not even the Special State's Attorney contends for this result. His position was declared earlier in People v. Sears, 49 Ill. 2d 14, 273 N.E. 2d 380, where his brief stated: "Relator Sears does not contend that his conduct before that Grand Jury is above judicial scrutiny. It should not be. (Gitchell v. People, 146 Ill. 175, 187 [33 N.E. 757].) But that scrutiny should be according to law, *invoked by persons after indictment*, as every case in the book demonstrates." And here he states: "The question here is what constitutes a sufficient showing to warrant the Court's order for a general hearing as to the conduct of the Special State's Attorney, the effect of which is to try the prosecutor and the grand jurors before any trial of the defendants on the indictment duly returned. Relator Sears has never con-

tended that the conduct of the prosecutor before the grand jury was not subject to judicial scrutiny, but has always claimed that it must be judicial scrutiny according to law. It is therefore highly important at the outset to have clearly in mind the law which permits the type of public trial envisioned by the Court's order, presently set for November 8, 1971. The leading case is Commonwealth v. Smart, 368 Pa. 630; 84 A. 2d 782. The court discussed the conflicting principles of public policy involved in 84 A. 2d on p. 785 and then said on p. 786: 'Even though it might be possible to imagine a situation which presented justification, and even necessity, to investigate the acts and conduct of a prosecuting officer during the course of his attendance upon the Grand Jury, it is certainly true that such an investigation should never, under any circumstances, *be instituted except on the basis of credible, detailed, sworn and persuasive averments by witnesses of the irregularities complained of.*' (*Emphasis ours.*) [*i. e.* Sears']"

The majority in reaching its decision relies upon Gitchell v. People, 146 Ill. 175, 33 N.E. 757, and dismisses as "scattered and sporadic" the decisions which clearly demonstrate the jurisdiction of the circuit court to enter the order and the propriety of its so doing. *Gitchell*, decided in 1893, involved an attempt to show by affidavits that an indictment had been returned on the vote of an insufficient number of grand jurors. At that time the pertinent statute provided: "No grand juror or officer of the court or other person shall disclose that an indictment for felony is found or about to be found against any person not in custody or under recognizance, except by issuing process for his arrest, until he is arrested; nor shall any grand juror state how any member of the jury voted, or what

opinion he expressed on any question before them; and the court, in charging said jury, shall impress upon their minds the provisions of this section. A violation of this section shall subject the offender to an attachment as for contempt of court, in which he may be fined not exceeding $500." Ch. 38, sec. 595, Starr & Curtis's Annotated Illinois Statutes.

How *Gitchell* can be relied on by the majority is not apparent. In the motion pending before the trial court the defendants do not seek to inquire as to how any grand juror voted. Further, as stated by the majority, the pertinent statute now contains the following provisions: "Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice." (Ill. Rev. Stat. 1969, ch. 38, par. 112-6.) I have noted already that the Special State's Attorney cited *Gitchell* as authority for the proposition that his conduct before the grand jury was not and should not be above judicial scrutiny.

The majority cites People v. Arnold, 248 Ill. 169, 93 N.E. 786, as authority for "the strictness with which this court has previously enforced the rule against the use of affidavits of grand jurors." *Arnold* was decided in 1910, 55 years before the relevant amendment to section 112-6 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1969, ch. 38, par. 112-6), and rests solely on a citation to *Gitchell*, a case patently not in point. Also, the opinion in *Arnold* shows beyond question that the court considered the matters sought to be presented by the affidavits (248 Ill. 169, 172, 93 N.E. 786, 787), and held "there could have been no prejudice to the defendant from anything that occurred before the grand jury."

The majority traces the origin of the 1965 amendment of section 112-6 to Rule 6(e) of the Federal Rules of Criminal Procedure. We agree that failure to include in the statute the provision of 6(e) for disclosure upon a showing "that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury" is significant. Under the prior holdings of this court, however, its significance is precisely opposite to that attributed to it by the majority. A basic rule of statutory construction is that the enumeration of certain matters in a statute implies the exclusion of all others, and the corollary rule is that exceptions other than those designated by statute cannot be read into it. (In re Estate of Tilliski, 390 Ill. 273, 283, 61 N.E. 2d 24.) It is apparent, therefore, that the amendment to section 112-6 authorizes disclosure "in the interest of justice" and not as the majority holds—in the interests of justice except under circumstances of which the majority does not approve.

We advert now to the "scattered and sporadic decisions" to which the majority refers. We start with our opinion in People v. Sears, 49 Ill. 2d 14, 273 N.E. 2d 380, wherein we held that section 112-6 provides for disclosure of matters occurring before the grand jury other than its deliberation and vote. In People v. Ianniello, 21 N.Y. 2d 418, 424, 288 N.Y.S. 2d 462, 235 N.E. 2d 439, 443 (1968), the Court of Appeals of New York said: "Courts have a particular responsibility to prevent unfairness in Grand Jury is an 'arm of the court' [citations]."

We refer further to In re Fried (2d cir.), 161 F. 2d 453 and Austin v. United States (4th cir.), 297 F. 2d 356, also cited in our earlier opinion.

In People v. Petruso, 35 Ill. 2d 578, 221 N.E. 2d 276, it is recognized by this court that a showing of improper

influence, undue prejudice or "other matters which might have caused a true bill to be improperly returned" may result in the quashing of an indictment. Just how this type of impropriety may ever be shown under the majority's view is not discernible.

In United States v. Remington (2d cir.), 191 F. 2d 246, the court clearly recognized that an indictment should be quashed if undue influence over the grand jury can be shown. Even the treatise cited by the majority (Wright, Federal Practice and Procedure) does not support the conclusion that the court did not have jurisdiction to order the inquiry. It only states that the courts have "ordinarily denied such requests on the ground that the defendant has not made a sufficiently strong showing that such grounds may exist."

Here the request for the hearing is supported by the affidavits of three grand jurors and the unsworn statement of a fourth. They charge that the Special State's Attorney frequently went off the record and made derogatory comments with respect to the veracity of some of the witnesses, that one of his assistants referred to a witness as a whore, a slut and a liar, that the Special State's Attorney expressed the opinion that the evidence of guilt was "overwhelming," that he "scolded" the grand jury for voting no bills on the preceding day, that when one of the grand jurors stated that an indictment was a very serious thing, the Special State's Attorney said, "Don't worry, an indictment is nothing but a piece of paper." It is also said that he stated that an indictment did not do anybody any harm because if the people named were not guilty they would be found not guilty at trial.

If affidavits charging such serious improprieties do not furnish a sufficient basis for the hearing ordered by the

circuit court, then it is difficult to perceive the circumstances under which a hearing would be warranted.

The opinion of the trial court demonstrates the legislative concern and wisdom underlying the amendment to section 112-6, which makes possible under exceptional circumstances a judicial scrutiny of the proceedings before the grand jury, a scrutiny which even the Special State's Attorney admits is authorized by law. The action taken by the majority today renders meaningless the principles and protections of due process insofar as they apply to proceedings before a grand jury. As I read the majority opinion the action is taken to counteract the allegedly increasing tendency to try some person other than the defendant. This, of course, does not warrant the far-reaching action taken.

I repeat that I make no judgment as to whether the indictment here should be dismissed or as to the veracity of the affiants.

It is a matter of regret that the majority has erroneously taken the position that no accused, however improper may have been the presentation to the grand jury, may seek to show this circumstance. The importance of the question goes far beyond this case.

KLUCZYNSKI and WARD, J. J., join in this dissent.

APPENDIX B

OPINION OF TRIAL COURT—OCTOBER 22, 1971.

STATE OF ILLINOIS }
COUNTY OF COOK } SS.

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,

vs.

EDWARD V. HANRAHAN,
RICHARD JALOVEC,
JOHN SADUNAS,
DANIEL GROTH,
RAYMOND BRODERICK,
EDWARD CARMODY,
JOHN CISZEWSKI,
WILLIAM CORBETT,
JAMES B. DAVIS,
JOSEPH GORMAN,
GEORGE JONES,
CHARLES KOLUDROVIC,
JOHN P. MEADE and
JOHN MULCHRONE.

Indictment No. 71-1791.
Charge: Conspiracy to Obstruct Justice.

OPINION

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 22nd day of October, A. D. 1971, at 2:00 o'clock P. M., this cause came on for hearing before the Honorable PHILIP ROMITI, Judge of this court.

PRESENT:

MR. BARNABAS F. SEARS,

MR. WAYLAND B. CEDARQUIST,

MR. HOWARD T. SAVAGE and

MR. ELLIS E. REID,

Special Assistant State's Attorneys, appeared on behalf of the People;

HON. EDWARD V. HANRAHAN,

appeared pro se;

MR. LEONARD HARTENFELD,

appeared on behalf of Edward V. Hanrahan;

MR. GEORGE J. COTSIRILOS,

appeared on behalf of Richard Jalovec;

MR. WILLIAM J. MARTIN,

appeared on behalf of John Sadunas and Charles Koludrovic;

MR. THOMAS P. SULLIVAN,

appeared on behalf of Daniel Groth, Raymond Broderick, Edward Carmody, John Ciszewski, William Corbett, James B. Davis, Joseph Gorman and George Jones;

MR. JOHN P. COGHLAN,

appeared on behalf of John P. Meade and John Mulchrone.

***

THE COURT: Be seated, gentlemen.

MR. SEARS: Good afternoon, your Honor.

THE CLERK: Edward Hanrahan, Richard Jalovec, John Sadunas, Daniel Groth, Raymond Broderick, Edward Carmody, John Ciszewski, William Corbett, James Davis,

Joseph Gorman, George Jones, Charles Koludrovic, John Meade and John Mulchrone.

THE COURT: Good afternoon.

MR. SULLIVAN: If I may.

Gentlemen, would you stand up, please, those of you that I represent?

All but Mr. Davis, your Honor, are standing and here is his waiver of appearance.

THE COURT: Did you submit a copy to Mr. Reid, please?

MR. SULLIVAN: I did.

MR. COTSIRILOS: Mr. Jalovec is present here in court, your Honor.

THE COURT: All right.

MR. HARTENFELD: Mr. Hanrahan is present, if your Honor please.

MR. COGHLAN: Messrs. John P. Meade and John Mulchrone are present in open court.

MR. MARTIN: If the court please, I have signed waivers by Mr. Sadunas and Mr. Koludrovic.

MR. REID: Can I have a copy of these?

MR. MARTIN: I'll send them to you.

MR. REID: Okay.

THE COURT: All right. I'll use this this afternoon. I think we are here, then, for a ruling on the motion this afternoon. And the court would, preliminarily, point out that a multitude of points have been raised and issues have been distilled from the great mass of documents and materials filed, so that to consider each of those points, albeit briefly, will necessarily take some time.

The first question to be answered before this court can make any resolution of the issues before it is whether or not the motion requesting a hearing and the quashing of this indictment, based upon alleged improper exhortations and undue influence exercised upon the grand jurors by the special State's Attorneys and further based upon allegedly improper prejudicial publicity, lies within the purview of Section 114 of Chapter 38, of the Illinois Criminal Code, which covers all statutory grounds for quashing indictments, or whether or not it lies within the provisions of either the State or Federal Constitutions.

Section 114-1(a)(5) provides a ground for dismissing and quashing an indictment when "the indictment was returned by a grand jury which acted contrary to Article 112 of the code and which results in substantial injustice to the defendants."

Thus one must examine the provisions of Section 112 in their entirety in order to determine whether the motion lies under 114-1(a)(5). Section 112 deals extensively with the selection and qualifications of grand jurors, the empanelling of grand juries, the duration of grand jurors, the duties of grand juries and the State's Attorney's relation thereto, the duties of other court personnel and the secrecy of proceedings.

The defendants, inter alia, contend, either directly or through express joinder, that their motion lies pursuant to sub-section 112-2(b) which provides for instructions to the grand jury. Defendants contend that the grand jury, due to alleged improper influences by the Special State's Attorneys, violated their instructions in ~~not~~ conducting a full investigation into the actions of the apartment occupants as well as into the actions of the defendants herein. Even assuming, arguendo, this to be true, the defend-

ants cannot avail themselves of this ground in attacking the indictment, because in this very case, People Ex. Rel. Sears vs. Power, the Illinois Supreme Court has already held that "the Circuit Court cannot limit the scope of the grand jury's investigation and that the grand jury may make presentments of its own knowledge without instructions or authority of the Court."

Next the defendants, directly or through express joinder, contend that the motion lies pursuant to Section 112-2(c) of the Code which provides for the oath of grand jurors. This oath merely provides that the grand jury shall "make diligent inquiry . . . a true presentment . . . and that no presentment be returned through malice, hatred or ill-will."

This section contemplates a fair and impartial investigatory body and deals exclusively with purposeful misconduct by individual grand jurors themselves in violating their oath. There are no allegations made by the defendants that any grand juror acted maliciously or out of hatred or through any ill-will. The allegations in the defendants' motion go only to the undue or improper influence exercised by the Special State's Attorneys. Thus, again, assuming arguendo these allegations to be true, there would, as a matter of law, be no violation by the grand jurors of their oaths.

Thirdly, the defendants cite Section 112-4(c) as a basis for their motion. Section 112-4(c) provides:

> "If twelve grand jurors concur that the evidence before them constitutes probable cause that a person has committed an offense the State's Attorney shall prepare a Bill of Indictment charging that person with such offense."

The defendants contend that if exhorted or pressured by the Special Assistant State's Attorneys, the grand

jurors could not properly concur within the meaning of this section. This Court agrees with the defendants that this provision contemplates concurrence by twelve fair and impartial jurors, completely voluntary, uncoerced and uninfluenced, and not concurrence brought about by arguments, pleas and exhortations by the prosecutors. To read the provision any other way would be to deny traditional standards of due process to the proceedings and render the provision almost meaningless. Illinois law has long recognized that the prosecutor must refrain from conducting himself, by word or deed, in such a manner as to invade the jury's province or tend to influence its action. Among the cases so holding are Gitchell vs. People, 146 Illinois, 175, People vs. Hartenblower, 283 Illinois 591, and People vs. Jameson, 387 Illinois 367.

Furthermore, this section provides, if not expressly at least impliedly, that a determination of probable cause by twelve grand jurors be made before the preparation of an indictment—This interpretation is consistent with the idea of fairness and that the prosecutor must not influence the grand jurors in their deliberations. The preparation of an indictment before deliberation could well have the effect of demonstrating the prosecutor's belief and opinion as to evidence and thereby, to some extent, when considered with other matters, influence a grand jury.

The affidavits attached to defendants motion allege that in this case the indictment was prepared before deliberations upon it; and indeed the Special State's Attorneys tacitly admit this was done by arguing and citing case law supporting the propriety of so doing. It must be noted that none of the cases cited by the Special State's Attorneys, however, deal with this statutory requirement,

and that all of these cases concern themselves with whether or not that fact and that fact alone prejudiced the defendants and unduly influenced the grand jury.

I would agree with the Special State's Attorney that this may in fact be only a technical violation not calling for quashing the indictment, where it constituted the sole allegation of impropriety and, indeed, might not alone be a sufficient showing calling for a hearing; but, in this case, as the court will later note, many other more substantive allegations, supported by statements and affidavits, are involved, in the light of which this prior preparation of an indictment may have a more significant meaning and effect.

Further, the defendants contend that the motion lies under Section 112-6(a), of the Criminal Code, which provides that the prosecutor shall not be present during the deliberations of the grand jury. Again the obvious purpose of this provision is to insure impartiality and avoid undue influence by the prosecutors, as well as to insure secrecy of the proceedings. It is true that Illinois cases have traditionally held that a violation of this provision in and of itself is not grounds for quashing an indictment unless prejudice is shown. People vs. Munson, 319 Illinois 596. However, once again, this is not the sole grounds raised in defendants' motion to quash. Many other instances regarding undue influence have been charged, all of which must be considered together, all of which must be considered in their cumulative effect.

The affidavits attached to the motion to quash the indictment create the impression that the proceedings on April 20th and April 21st, at which time it is alleged the Special State's Attorneys were present, constituted deliberation upon the evidence by the grand jury. If these

were deliberations, the statute was violated and the question remains: What effect, if any, did this presence have on the grand jury and were the defendants prejudiced thereby? This court cannot determine or resolve this issue based solely on the pleadings of the parties. Thus, the motion lies pursuant to Section 112-4(c) and 112-6(a).

However, even if the motion did not lie pursuant to statute, it seems to this court that the motion lies pursuant to both the federal and state constitutions under their respective "due process" clauses. Furthermore, in Illinois the defendants have an absolute constitutional right pursuant to Article II, Section 8, of the 1870 Constitution, and Article I, Section 7, of the 1970 Constitution, to a grand jury indictment, where the possible punishment is imprisonment in the penitentiary, as is the case for the offense charged in the instant indictment. These provisions convey substantial rights to those charged with crimes. I suppose it is axiomatic that for the constitutional right to an indictment to be meaningful it must be regarded as contemplating a fair and impartial investigation by a duly constituted investigatory body with a presentment based solely upon the evidence in compliance with traditional and substantial due process.

Our Supreme Court recognized this right to due process in a grand jury proceeding, when it held in People Ex. Rel. Sears vs. Power, saying:

> "Neither the prosecutor nor the grand jury is vested with the power to proceed without regard to due process."

Exhortations and undue influence, if they occur, by a prosecutor upon a grand jury to return an indictment do not square with due process requirements. United States vs. Wells, 163 Federal 313, Commonwealth vs. Smart, 368

Pacific 630. The functions of the prosecutor, Judge and the grand jury, properly executed, act as a system of checks and balances. See State vs. Good, 460 Pacific 2d, 662. In Attorney General vs. Pelletier, 134 North Eastern 2d 407, the court stated:

> "The grand jury is preserved as one of the safeguards of liberty by Article 12 of the Bill of Rights in a clause plainly conformable to the words of Magna Charta. . . . Its purpose was sedulously to preserve in its integrity the absolute freedom of the grand jury from any outside influence. It would be a mockery of constitutional rights and obligations to permit the district attorney because of his position with the grand jury secretly to exercise a control which the court is forbidden to exercise even openly . . ."

It seems to this court that the role of the prosecutor before a grand jury which is to determine whether or not a charge is to be lodged against a defendant, whether or not a true bill is to be returned, must be different from his role or position as an advocate before a petit jury at the time of trial on the question of innocence or guilt.

A prosecutor, whose role during grand jury proceedings is carefully circumscribed, must refrain from conducting himself by word or deed in such a manner as to invade the jury's province or tend to influence its actions. State vs. Good, previously cited, United States vs. DiGrazia, 213 Federal Supplement 232 and Hammers vs. State, 337 Pacific 2d 1097. Exhortations and factual interpretations by the prosecutor to the grand jury are improper. The members of the grand jury should be permitted to act freely—free from sway or control from any source and without fear or favor. Illinois law is greatly to the same effect. Gitchell vs. People, People vs. Hartenblower and

People vs. Jameson, cited supra are examples of that. Indeed, the Illinois Supreme Court has expressly recognized, in a manner of speaking, the validity of these positions in their opinion in People Ex. Rel. Sears vs. Power, wherein the court states:

> "Much of the petitioners' argument deals with the necessity for secrecy of the grand jury proceedings contending that the prosecuor cannot fearlessly perform his duties, if at any time the court can intrude itself in these proceedings and exercise the powers claimed. The short answer to that is that the grand jury is an integral part of the court and not the tool of the prosecutor."

In State vs. Good, previously cited, the court stated:

> "There is a lack of due process and an injury to the system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the judicial process, when a county attorney improperly attempts to influence the actions of the grand jury."

See also Commonwealth vs. Bradley, 17 Atlantic 600, Commonwealth vs. Favulli, 224 North Eastern 2d 422, Commonwealth vs. Schnackenburg, 248 North Eastern 2d, 273, Blake vs. State, 14 Pacific 2d 240, and Blair vs. State, 34 Southern 153.

Indeed, not only would the above described conduct be grounds for quashing an indictment, but the grand jurors themselves would be competent witnesses to give testimony thereon. The propriety of calling members of the grand jury to testify at proceedings on a motion to quash an indictment is covered by the Illinois Code of Criminal procedure, Chapter 38, Section 112-6(b). This section deals with the secrecy of the grand jury proceedings and entrusts the decision to disclose those proceedings to the

sound discretion of the court. Subsection (b) provides, in pertinent part:

> "Matters other than the deliberations and votes by any grand juror may be disclosed by the State's Attorney solely in the performance of his duties. Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice. . . . Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the grand jury other than in accordance with the provisions of this subsection is in contempt of court, subject to proceedings in accordance to law."

By its very terms, this section fully anticipates an examination of the grand jury proceedings through the device of disclosure by the grand jurors themselves. This interpretation is inescapable, it seems to this court, in the light of the last sentence of the quoted subsection. In that last sentence disclosure by a grand juror is specifically referred to and is precluded under punishment of contempt unless disclosure is made in accordance with the previous provisions of the subsection; that is, by order of court, in the interest of justice, matters occurring before the grand jury, other than deliberations and the vote of any grand juror, may be disclosed.

The statute became effective on August 20th, 1965. This date has significance since *previously existing case law in Illinois exhibited the philosophy that the secrecy of the grand jury could only rarely, if ever,* be invaded. The classic statement of this line of holdings can be found in Gitchell vs. People.

It seems to this court that a reading of the joint cases of People vs. French and People vs. Hopf, 61 Illinois Ap-

pellate 2d 439, decided August 4th, 1965, just two weeks before the new statute, is imperative to a full understanding of the rationale underlying the veil of secrecy afforded grand jury proceedings and for an understanding as to when those compelling reasons are satisfied and disclosure justified.

In those cases the Court said:

> " . . . at the outset, it must be appreciated that the veil of secrecy surrounding grand jury proceedings is fundamental to our criminal procedure . . . Secrecy serves to insure the most efficient performance of the grand jury in its functions in both an accusatory and inquisitorial body in that it helps:
>
> 1. To prevent the escape of those indicted.
>
> 2. To insure the grand jury freedom in its deliberations.
>
> 3. To forestall subornation of perjury with witnesses who may testify before the grand jury and later at trial of those indicted by it.
>
> 4. To encourage full and untrammeled disclosure by persons who have information with respect to the commission of crimes, and
>
> 5. To protect the innocent person, who is accused but exonerated, against unwarranted exposure."

The court then went on to say that many of the reasons for secrecy are removed after indictment and that most certainly the veil of secrecy is not impenetrable. Certainly secrecy is not an end in itself but a means to further justice by permitting the grand jury to function most effectively. Thus, where the ends of justice require, certain of the proceedings of the grand jury may be disclosed. United States vs. Socony-Vacuum Oil Company, 310 U. S. 150, People vs. Johnson, 1 Illinois 2d, 602.

Prior to the 1965 amendment, Section 112-6 (b) limited disclosure to transcripts of the testimony of the witnesses to be used by the state at trial. In 1965, the Legislature broadened disclosure to cover all situations. By broadening the scope and availability of disclosure, the amendment tacitly recognized the policy, the current trend and modern view, that once an indictment is returned, the rationale underlying and the compelling reasons calling for the maintenance of secrecy are at an end.

The Committee comments relating to this section of the Criminal Code are of great value for reason that the revised provisions of Section 112-6, relating to this topic, have not been passed upon by the Illinois Courts of Review, and no case, to this court's knowledge, exists in Illinois interpreting this provision. The Committee comments expressly state and refer to a related rule contained within the Federal Rules of Criminal procedure, to-wit, Rule 6 (e). The similarity between the Federal rule and the Illinois provision is strong and it seems obvious that Illinois has been brought into line with modern Federal procedures in this regard.

The Federal Courts have frequently subjected Rule 6 (e) to judicial interpretation. In essence, discretion is vested in the trial court as to whether or not to pierce the veil of secrecy of the grand jury and order disclosure. The federal decisions also indicate that the burden is upon the defendants to show a particularized need and that the ends of justice require disclosure. United States vs. Wells, 163 Federal 313, United States vs. Rintelen, 235 787, United States vs. Borays, 169 Federal Supplement 366, United States vs. Colise, 217 Federal Supplement 705, United States vs. Badger Paper Mills, Inc., 343 Fed-

eral Supplement, 443 and Allen vs. United States, 398 Federal 2d 476.

A review of the decisions of other jurisdictions also clearly indicate that the giving of testimony by grand jurors at a later judicial proceedings, including a hearing on a defense motion to quash an indictment, is not unique in American jurisprudence. Whenever the interests of justice have demanded it and a particularized need has arisen, the secrecy of the grand jury has been set aside. See State vs. Colson, 138 South Eastern 2d 121, North Carolina, 1964; in Re: Presentment of Camden County Grand Jury, 169 Atlantic 2d 465, New Jersey; Attorney General vs. Pellitier, 132 North Eastern 407, Massachusetts; Opinion of Justices, 73 Atlantic 2d 433, New Hampshire; in re: Jessups Petition, 136 Atlantic 2d, 207, Delaware; States vs. Manney, 133 Atlantic 2d 313, New Jersey; Commonwealth vs. Schnackenberg, 248 North Eastern 2d 273, Massachusetts; and State vs. Kifer, 173 Southern 169, Louisiana.

From the foregoing it is apparent that the secrecy of grand jury proceedings is not absolute and must properly yield where the interests of justice require. It is also clear that prosecutorial misconduct before the grand jury, if supported by evidence thereof, would justify piercing the veil of secrecy, if a hearing thereon is required. U. S. vs. Wells, State vs. Good, previously cited, U. S. vs. DiGrazia, Attorney General vs. Pelletier, and Hammers vs. State, 337 Pacific 2d 1097.

The question of whether the interests of justice so require and whether the defendants have a sufficient showing to require a hearing are matters to be decided by the trial court in the exercise of its judicial discretion. Indeed, the Special State's Attorneys tacitly concede

this to be the law, when they acknowledge in one of their answering briefs: "We have never claimed that our conduct before the grand jury was above judicial scrutiny. We have always agreed that it should be subject to judicial scrutiny according to law," and then placing their reliance upon Commonwealth vs. Smart and contending that the defendants have not made a sufficient showing to require a hearing and that consequently defendants' motion should be denied as a matter of law. Thus, the final issue this court must decide is whether or not the defendants have made a sufficient showing to establish, at least prima facie, that the indictment was irregularly returned in contravention of their, the defendants', constitutional rights.

Some concern has been expressed as to the precedent-setting effect if a hearing were ordered. This court appreciates and shares in that concern. However, this court also believes that in our system of justice the rights of those accused of crimes cannot and should not be denied or abrogated because of a danger of precedent-setting. Perhaps in these days of assaults upon the so-called system, clamor for change and for streamlining procedures, precedent-setting may take on a more palatable and acceptable connotation and should be of secondary importance. Certainly law cannot and should not remain static. It is difficult for this court to envision change without some precedent-setting action of one kind or another. Fear of setting precedent should not, it seems to this court, be a deterrent to change.

But be that as it may, if a hearing were ordered in this case, it would not be such a precedent-setting event as is suggested, since such hearings are not presently unique in our law and, further, they would be regulated

and controlled and limited to the exceptional or particularized case, in accordance with guidelines and standards set by the court as hereinafter set forth.

This court most assuredly agrees with the Special State's Attorneys that public policy dictates that a strong showing must be made before inquiry can be had into the conduct of the prosecutors before the grand jury. As the court said in Commonwealth vs. Smart:

> "To allow such an investigation lightly to be had would afford an opportunity to every defendant to institute dilatory proceedings and divert the course of justice from himself to an attack upon the public officials charged with administering the law and thereby seek to make them the defendants in the proceedings instead of himself."

The court further agrees that such inquiry should only be instituted when based upon "credible, detailed, sworn and persuasive averments by witnesses of the irregularities complained of."

The Special State's Attorneys go on to state that the defendants have not made this requisite showing. With this statement this court cannot agree for the following reasons:

First: The defendants allege, and support or substantiate to a great extent by affidavit, that after the voting of no bills on April 20th, 1971, a special State's Attorney spoke to the grand jurors off the record, on April 21, 1971, and either before or during the reading of the indictment *indicated to them*, either expressly or through his *actions* and *gestures*, among other things, the following:

a. That he was displeased with the no bills voted the day before.

b. That he could not understand how the grand jury could not have voted a true bill.

c. That he then gave reasons why the grand jurors should indict certain defendants.

d. That he hoped that it would not be necessary for him to talk to the grand jurors in this manner.

e. That he argued with the grand jurors on April 21, 1971 and made them look dumb.

f. That he said, "The only way to see it that the police are guilty."

g. That he told the grand jurors, on April 21, 1971, that they had done a bad job by voting no bills the day before.

h. That he said an indictment is only a piece of paper and not to worry about voting a true bill; that an indictment does not do a defendant any harm.

i. That he scolded the grand jurors for voting no bills.

j. That he told the jurors he had other evidence that also indicates guilt but that this evidence would be presented at trial.

k. That he stated he was not going to make the same mistake today that he had made yesterday, apparently referring to his not addressing the grand jury before their April 20th vote and then addressing them before their vote on April 21st.

l. That the grand jury should vote a true bill, if there was a slight possibility of guilt.

Now, the above issues are all raised by affidavit appended to the defendants' motion and are expressly denied by affidavits appended to the State's reply. Thus substantial issues of fact result. This court can neither

verify nor dispel these allegations by reference to the transcript because it is alleged that these proceedings were "off the record" with the court reporter being excused by the Special State's Attorneys. These allegations, if true, strike at the very heart of impartiality and would have only one purpose and effect in a grand jury proceeding—to influence deliberations and findings. These allegations place this case strikingly within the factual context of United States vs. Wells and would, in and of themselves, meet the test of Commonwealth vs. Smart relied upon by the State.

The showing is further strengthened when one considers that, on April 20th, 1971, the grand jury voted all no bills, one of which involved an offense very similar in nature and action to the charges underlying this indictment. Yet, on April 21, 1971, without hearing any additional evidence, the grand jury voted a true bill. The question which requires answering is obvious.

Secondly, the defendants allege, and again support by affidavit, that during the grand jury proceedings and before deliberations, the prosecutor summarized evidence, interpreted the evidence, told the grand jury which witnesses to believe and what evidence was important and should be considered and what evidence was unimportant and should be disregarded.

Much of this conduct, it is alleged, occurred by *gesture* and off the record remarks or asides. No less than fifteen specific instances of this type of conduct are alleged in the affidavits and denied by the Special State's Attorneys. As has already been pointed out, it is improper for the prosecutor to comment upon the evidence, to give his opinion as to where the truth lies or reflect upon the sufficiency of the evidence. Thus, if these allegations or

occurences took place, it was error. When these allegations are coupled with the instances discussed above, the court feels that a sufficient showing has been made with regard to prejudice to the defendants.

Thirdly, and in addition to the above, at least two technical violations of Section 112 of the Code of Criminal Procedure are in issue, namely, the *preparation of* an indictment prior to concurrence of twelve grand jurors that probable cause existed and the *possible* presence of the prosecutor during the deliberations of the grand jury.

As has already been stated, these in and of themselves may not demonstrate sufficient prejudice to require a hearing; but, when coupled with all the other allegations of impropriety hereinabove referred to, this court believes a hearing is necessary to determine whether these acts occurred and, if so, what, if any, effect all of these actions, given cumulative effect, had upon the ultimate determination and findings of the grand jury.

The Special State's Attorneys acknowledge a hearing would be necessary if issues of fact exist and if the Smart case standards were met. This court specifically finds that based upon the foregoing the requirements of Smart have been met. Further, this court would add; that the foregoing specific references are by no means to be interpreted as a comprehensive or all-encompassing recitation of the sole basis upon which this court finds that a sufficient showing has been made to require a hearing.

In addition to the specifics herein recited, in excess of some seventy specific acts of impropriety are alleged and supported by statements or affidavits. Some of these are specifically denied by the prosecutors, others the State contends are contradicted by the transcripts of the grand jury proceedings. These lesser allegations, while in and

of themselves inconsequential and insufficient to require a hearing, all dove-tail with the foregoing factors and bear upon the issue of improper influence.

All these matters create factual issues which require resolution pursuant to the requirements of Section 114-1 (d) of the Criminal Code of Procedure. Thus, the compilation of all these additional averments, added to the specific averments already alluded to, remove any doubt in this court's mind that *a full hearing is required* and that a sufficient showing has been made within the meaning and standards of the Smart case.

The Special State's Attorneys contend that the affidavits of the grand jurors appended to Defendants' motion should be stricken because they refer to the deliberations and vote of grand jurors. If this is done, they argue, the defendants' showing is insufficient. The court finds that insofar as it can determine from the documents, the matters contained in the affidavits do not touch upon the actual deliberaions or vote of any grand juror.

Whether the proceedings referred to therein actually constituted the grand jurors' deliberation would be a fact question to resolution only after a hearing. Furthermore, even if portions of the documents do touch upon deliberations or the vote of the grand juror, it would seem that the remedy would be merely to strike those portions of the affidavits. Even though these contested portions were stricken, sufficient allegations remain to require a hearing. Parenthetically, it might be added, that if the grand jurors violated the proscription of Section 112-6 of the Criminal Code of Procedure, the remedy is contempt as therein provided.

The Special State's Attorneys also contend that affidavits can not be used to make the requisite showing and

that the law precludes a grand juror from impeaching the indictment. Yet the court notes that the very case upon which the prosecutor relies, Commonwealth vs. Smart, referred to the use of verified pleadings as requisite to establishing the necessary showing of impropriety. Most of the cases cited by the defendants in their documents and briefs likewise involved the use of affidavits of grand jurors.

If the law were as the prosecutor contends, improper conduct of prosecutors before grand juries could rarely, if ever, be disclosed and thus made the basis for a motion to quash, especially in cases where, as here, it is complained that the prosecutor took steps to keep the matters complained of "off the record."

The Special State's Attorneys also contend that the affidavits of the grand jurors should be stricken because no valid order has been entered releasing the grand jurors from their oath of secrecy, pursuant to statute. This issue has been raised and previously ruled upon by this court on different occasions, and this court adheres to its prior rulings. Furthermore, the argument can be made that even if the Special State's Attorneys were correct, the remedy would not be to strike the affidavits nor deny the defendants access to them but to subject the grand jurors to the contempt as the statute provides.

The Special State's Attorneys also contend that the indictment was re-voted on June 24th, 1971 and no allegations of impropriety taint that re-voting. Thus, it is argued, as a matter of law, that no hearing is required. The answer to that can be made by posing a question, I suppose: How does one unring a bell? How do you go about erasing taint, if it once occurs? Can it be said, as

a matter of law, that taint, if once occurring, will automatically be erased by a relatively short passage of time.

In short, if undue influence resulted in a taint of the grand juror on April 20th and 21st, then any proceedings occurring thereafter might well have been affected by that taint. At the very minimum, a hearing would be required in order to make that determination. The whole argument by the Special State's Attorneys in this regard really begs the question.

Finally, the Special State's Attorneys argue that no hearing is required because the defendants have made no attack upon the sufficiency of the evidence supporting the indictment. However, case law seems to me, to preclude such an attack by the defendants. See United States vs. Costello, 350 U.S. 359, and all cases cited therein. Seemingly, this issue cannot be raised as a basis to attack an indictment unless all of the witnesses are or evidence is incompetent. See People vs. Duncan, 261 Illinois 339. Additionally, the Court has read the transcript of the proceedings before the grand jury in camera and, although the court chooses not to comment upon the merits of that evidence for reasons of propriety, it finds the State's position in this regard without real merit.

There remains for determination by the court the secondary conention of defendants that the massive publicity surrounding this case prejudiced their constitutional rights. The issue of prejudicial publicity likewise dovetails with the issues discussed earlier, insofar as they all bear upon the question of undue influence and the impartiality of the grand jury.

It is readily apparent that most of the recited instances of publicity involved publications and commentaries occurring after the allegedly critical dates of April 20th

and 21st. In this light, then, the showing of prejudice is questionable. However, an issue remains as to what effect, if any, that publicity had on the re-voting proceedings of June 24th, 1971. In addition, the publicity issue, the defendants allege, is directly correlated to the issue of prosecutorial exhortations. Indeed, a specific allegation is made by the defendants, supported by affidavit, that the grand jury was told that the news media from all over the world would be interested in the outcome of their proceedings and that the public had a right to know what the evidence was and that a public trial was required. The implications which might well have been drawn from such statements, if made, are somewhat obvious.

The court believes it necessary to determine, first, whether such a statement was made; and, if so, not only to determine what effect, if any, it had on the grand jurors, but *also to determine what effect, if any, prior or subsequent news accounts combined with such statements had on that jury.*

The court takes note of the fact that these proceedings took place over many months in the same locality where the incidents underlying the indictment occurred and where the greatest concentration of publicity existed. While it is true there certainly is no requirement that it be done, the court must nonetheless note, in passing, that, factually, the grand jurors were not sequestered, nor was their reading matter or radio programs or television viewing monitored in any way so as to insulate them from the news accounts with which this case was saturated. In fact, no order, to this court's knowledge, was ever secured directly the grand jurors to avoid contact with news accounts bearing upon the subject matter

of their investigation. In this regard, see Sheppard vs. Maxwell, 384 U. S. 333.

Thus, since the two issues are directly connected and indeed, to a degree, overlap, and since the court has indicated a hearing will be required, the *court will not exclude therefrom inquiry into the issue of prejudicial publicity.* See, also, Beck vs. Washington, 29 Federal 2d, 622.

In conclusion, the court would point out that it is not unaware nor oblivious to the great public interest this case has generated. It is not unaware or oblivious to the fact that individuals and groups of influence, in high position and responsibility to the community, have made public statements concerning this matter; that many charges and counter-charges have been leveled not only by the litigants but also by those who have no actual connection with or standing in this case. These events have resulted in clouding or obscuring the real issues and in distorting from reasonable perspective the nature of the proceedings. *A full and open hearing into the matters herein discussed* will restore a proper perspective and may, to a large extent, to use a very old cliche, "Clear the air."

Accordingly, the Special State's Attorneys' motion, insofar as it requests the striking of defendants' motion and affidavits appended thereto, is denied, and the defendants' motion, insofar as it requests a hearing, is allowed. *And it is, therefore, ordered that a hearing be held on the issues hereinabove set forth and that said hearing be and the same is hereby set for November 1st of 1971.*

Now, before that date is firmed up, the court is going to declare a fifteen minute recess to permit counsel to

consult their calendars and to discuss the matter amongst themselves. The court is recessed for fifteen minutes.

MR. SEARS: Your Honor, is it possible to get a copy of that Opinion?

THE COURT: I only have this working copy and I don't like to have it leave my possession.

(A recess was taken, after which the following proceedings were had):

A DEPUTY SHERIFF: Court is now in session.

MR. SULLIVAN: Your Honor, I have sort of been consulting, on behalf of co-counsel, with Mr. Sears and his associates. It is the desire of the attorneys for the defense to proceed with the hearing on the date set by your Honor, that is, November 1st. And it is our strong desire to do so on that date. We were notable to agree with Mr. Sears on that subject.

THE COURT: Well, I think the court indicated that it set November 1st as the date for the commencement of the hearing, but the purpose I had in mind was that I wanted you to check your trial calendars and see if there were any conflicting problems that you had. November 1st would be a very convenient date for the court to start here.

MR. REID: Your Honor, I have a jury trial scheduled. It's a long-standing case that was supposed to go ahead November 1st. I've cleared that date because it's a Monday and it will take a week. I also am a hearing officer for the FEPC, the State Fair Employment Practices Commission, and I am to hear two matters, one November 10th and one November 11th.

THE COURT: Oh, I'm not going to set it over that long because the court has problems, too, you see. I've

got to fit ths into my calendar, to a large extent, and I've got a pretty heavy trial call myself that I have to go ahead on. I don't think we will ever get nine lawyers in a courtroom where all nine lawyers are going to be absolutely free for any particular period of time. So unless there's something to the contrary, my order is going to stand as is. The hearing is set for November 1st.

MR. SEARS: May I be heard, your Honor?

THE COURT: Yes.

MR. SEARS: It will be absolutely impossible for us to go to trial on the 1st day of November. Now, we would like to have an opportunity, first of all, to study your Honor's Opinion, which is a rather lengthy Opinion, and we have not talked to anybody, any of the jurors, in respect to this matter, and they are going to be witnesses in the case. We have been tied up in this thing day and night—

THE COURT: Now, let me put it this way:—

MR. SEARS: —and it's just impossible for us to go to trial on the 1st day of November. Now, I would—

THE COURT: Let me say this, Mr. Sears: The court is going to let the order stand for November 1st. If you find it impossible, well, then you can come in and ask for a continuance at that time. Let's see what the situation looks like. Let's see what you can do.

MR. REID: Judge, if it please the court, we are asking for it now because we know the problems we have. We have not talked to one single juror.

THE COURT: Yes. But you are talking to me about the matter going over somewhere toward the latter part of November.

MR. REID: Only to the 15th, Judge. It's only two weeks, two Mondays after the first. That's what we are talking about, your Honor.

MR. SULLIVAN: Your Honor, the fact that there are so large a number of lawyers involved and so many schedules, if you put this over at all from November 1st, there will be inevitably one or more of us that cannot make it.

MR. COTSIRILOS: I'm telling you, I'll be on trial in some other case and I think Mr. Sullivan will be on trial. Now, that will be our situation so that this thing will go on interminably.

THE COURT: I understand that's the problem.

MR. SEARS: But, certainly, today is the 22nd,—

THE COURT: That's right.

MR. SEARS: —and to set a matter of this magnitude, if I read your Honors Opinion, within a time of eight days, it seems to me that it gives us rather short notice. I mean, we have to study your Honor's Opinion to determine what course we should pursue, of which you, I'm sure, are well aware, and to study that problem. And it seems to me that—

THE COURT: All right, I don't want to haggle about the date. I've got to get going. If I'm going to go to a hearing, I can't be delayed until the latter part of November. I'll compromise with counsel and set November 8th for the date of the hearing. Let's see what you can do between now and the 8th of November.

MR. SEARS: And if we are not ready on the 8th of November, we can come in on a motion to show cause, is that right?

THE COURT: Right now the matter is set for the hearing to commence on the 8th of November.

MR. COTSIRILOS: Your Honor, we can be ready on the 1st.

THE COURT: I'll compromise. There's a two week period here. November 8th, gentlemen.

MR. SEARS: Your Honor, may I inquire when I can get a copy of your Honor's decision?

THE COURT: I don't have a copy. The only copy I have is my working copy and you can get a daily copy from the reporter and he'll give you the copy. Just get it, get the transcript and it will be in there.

MR. REID: Your Honor, can you tell us what time this matter is set for?

THE COURT: Ten o'clock in the morning.

MR. SAVAGE: Your Honor, is it possible for us to borrow your copy and return it—

THE COURT: No. I only have one working copy and it's pretty well hashed up, and I don't think anybody is going to be able to read it but me, anyway. You can have a copy tomorrow morning or the next day from the court reporter. Court is adjourned.

(A further hearing in the above entitled cause was continied to ten o'clock A. M., Monday, the 8th day of November, A. D. 1971).

APPENDIX C

"Statement of William L. Murtaugh given to John P. Coghlan on September 6, 1971.

Questions by John P. Coghlan. Answers by Mr. William L. Murtaugh.

* * * * * *

Q. Mr. Murtaugh, I beleve you already know my name is John Coghlan and that I represent Capt. Mulchrone and Sgt. Meade.

A. Yes, I do.

Q. Are you the same William L. Murtaugh that was a member of the Grand Jury that investigated the shooting of Fred Hampton and Mark Clark?

A. Yes, sir.

Q. Judge Power decided that it was o.k. for you Grand Jurors to talk to us defense lawyers provided you did not discuss the grand jury's deliberations while you were alone or what your vote was. Do you have any objections to my asking questions on any other matters?

A. Not at all. I would be happy to tell you what I know.

Q. Thank you.

Q I notice that you have some notes with you, Mr. Murtaugh. Could you tell me what those notes are?

A. Yes, sir. These are the notes that I took daily during the grand jury sessions. I'd like to have them in front of me.

Q. That is fine with me. Mr. Murtaugh, how many different court reporters transcribed the grand jury proceedings?

A. Do you mean how many court reporters at a time or how many court reporters did serve in all?

Q. Let's take first, how many court reporters in all did you have?

A. Three.

Q. Do you know who they were?

A. Mr. Baarstad, Mr. Hoskins, and Miss Alipuria.

Q. How many court reporters at a time did you have before the grand jury?

A. Mr. Baarstad and Mr. Hoskins were both present at the same time on one day about the middle of December 1970. I didn't ever see Mr. Hoskins after that first day. Mr. Baarstad took the notes from that point on whenever a court reporter was present until some time when Mr. Hanrahan was testifying when Mr. Baarstad was replaced by Miss Alipuria.

Q. So then with the exception of the one day that Mr. Baarstad and Mr. Hoskins were present, only one court reporter was present at any one time.

A. That is right. With that one day's exception. If a court reporter was present, there would be only one.

Q. Mr. Murtaugh, I am particularly interested, at this time, in what was said and done in the presence of grand jurors by Mr. Barnabas Sears and by his assistants.

A. What would you like to know?

Q. Will you describe, in general, the treatment John Mulchrone received when he appeared before the grand jury?

A. Capt. Mulchrone appeared twice. There was a big difference between what happened the first time he appeared and what happened the second time.

Q. What happened the first time he appeared?

A. The first time Capt. Mulchrone appeared, he was cross-examined by Mr. Sears. Mr. Sears started out by reading the immunity waiver and checking to see that Capt. Mulchrone had signed it. Then Mr. Sears started asking Capt. Mulchrone questions. As Mr. Sears questioned Capt. Mulchrone, Mr. Sears was reading from the transcript of Capt. Mulchrone's testimony before the Federal Grand Jury. Mr. Sears kept trying to point out that Capt. Mulchrone was lying, because he didn't answer some of the questions the same way he had answered them before the Federal Grand Jury. As soon as Capt. Mulchrone said anything that was not contained in the federal transcript, Mr. Sears would cut him off by telling him to answer yes or no and by refusing to let Capt. Mulchrone explain. Capt. Mulchrone was on the stand about four hours the first time. He never really did finish telling us what he did in the investigation, because Mr. Sears kept putting questions so that Capt. Mulchrone could answer only yes or no and refusing to let Capt. Mulchrone tell us what had happened.

Q. Was Mr. Sears courteous?

A. No, sir, he was not.

Q. In what way was Mr. Sears discourteous?

A. Mr. Sears' tone of voice was contemptuous, disbelieving, and belligerent. Mr. Sears laughed at Capt. Mulchrone's answers about five or ten times. In fact, on one occasion when Mr. Sears was laughing at Capt. Mulchrone, Capt. Mulchrone got indignant and protested to Mr. Sears.

Q. Did Mr. Sears then stop laughing at Capt. Mulchrone?

A. No, sir, he did not.

Q. Do you know whether or not Mr. Sears believed Capt. Mulchrone's testimony?

A. I know that Mr. Sears did not believe Capt. Mulchrone's testimony.

Q. How do you know that Mr. Sears did not believe Capt. Mulchrone's testimony?

A. He showed his disbelief by his gestures, his tone of voice, his manner of questioning, and his contemptuous laughter.

Q. Did you read Clara Goucher's statement?

A. Yes, sir, I read it in the newspaper.

Q. Is the statement of Clara Goucher correct or incorrect?

A. Clara Goucher's statement does a good job of telling what happened, but I disagree on a couple of points.

Q. What points do you disagree on?

A. Well, I don't believe it was Mr. Collins who said "If this is the kind of Police Department we've got, we're all in serious trouble." That was said by Mr. Cedarquist, and Mr. Collins got in it trying to make peace when Capt. Mulchrone got indignant at the intermission. Also, from Clara Goucher's statement you get the idea that Mr. Sears listed nine reasons in a row why we should indict each person he had named in the indictment. Mr. Sears said those things all right, but they weren't said in order like that.

Q. Well, how were those things said?

A. Well, on April 21, Mr. Sears came in and first said "I'm not going to make the same mistake that I

made yesterday." Then he started reading the big conspiracy indictment. That indictment lists something like 20 acts that Mr. Sears had said the police and the State's Attorneys did wrong. Mr. Sears would read each of the acts and then a discussion would follow with jurors and Mr. Sears both talking. Sometimes jurors would say they disagreed, and sometimes Mr. Sears would just volunteer his opinion without a juror saying anything. All of those things that Clara Goucher says Mr. Sears said were reasons given at that time.

Q. Did Mr. Sears say that Capt. Mulchrone and Sgt. Meade and other had tried to hide evidence?

A. Yes, sir, he did.

Q. When did he say that?

A. He told us that it was because he believed Capt. Mulchrone and Sgt. Meade had tried to hide evidence that he had written them into this indictment, and he said it between the time he started reading the indictment and the time that he finished reading the indictment.

Q. Did Mr. Sears read that conspiracy indictment through without interruption?

A. No, sir, he did not.

Q. How many interruptions were there?

A. About 20.

Q. When did these interruptions take place?

A. After each numbered paragraph Mr. Sears would stop, tell us why that paragraph was there, and tell us why he believed that the persons named in that paragraph had violated the law and why each of those persons should be indicted.

Q. Did Mr. Sears say that other policemen had deliberately confused the guns?

A. Yes, sir.

Q. And was this said on April 21?

A. Yes, sir.

Q. What, if anything, did Mr. Sears say about Jalovec and Meltreger on April 21?

A. Mr. Sears said that the evidence was clear that Jalovec had gone to Mulchrone's office and sent Meltreger and Sorosky there to conceal evidence and protect the police who were on the raid.

Q. Do you remember anything else that Mr. Sears said on April 21?

A. Yes, sir. After each of the numbered paragraphs, Mr. Sears would say, "Now you do what you want, but how can you see this any different way?" It was when he would ask this question some jurors would tell him that they did see it a different way; and Mr. Sears and that juror would get into an argument and then Mr. Sears would start making the juror look dumb because the juror didn't see it Mr. Sears' way. Then Mr. Sears would tell all of us jurors that the only way to see it is that the police and the State's Attorney were guilty.

Q. What, if anything, else did he say at this time?

A. Mr. Sears said that if there was just a slight possibility of guilt we should vote a true bill, and he also said that, in his opinion, the evidence was overwhelming and that we should vote an indictment. He also said that we had done a bad job the day before, and he scolded us for voting "no bills" the day before. One of the jurors said that an indictment was a very serious thing, and he disagreed with Mr. Sears and then Mr.

Sears said not to worry—that an indictment was nothing but a piece of paper. Mr. Sears said an indictment didn't do anybody any harm because if the people he named were not guilty, they would be found not guilty later on a trial. Mr. Sears also said that we shouldn't worry about voting a true bill, and he said, "if you vote a true bill, I promise you that when the newspapers and TV from all over the world come here to Chicago, I will stand up and be the first to say 'these men are innocent. It is just that we all felt the public should have a chance to know what went on by hearing it at a public trial because grand jury proceedings are secret'."

Q. Do you know whether or not Mr. Sears was pleased or displeased with your conduct on April 20?

A. I know he was displeased.

Q. How do you know that?

A. He showed it by the look on his face and his tone of voice when he asked Dick Balla to recess the jury the afternoon of April 20, and he showed it again by his facial expressions, tone of voice, and gestures on April 21 when he talked to us.

Q. How long did Mr. Sears talk to you on April 21?

A. An hour and a half.

Q. Was he talking to you steady for that hour and a half?

A. No, sir.

Q. How long actually was spent in reading the indictment and how long was spent in giving his reasons why you should vote a true bill?

A. All you would have to do to find that out is read the indictment through, see how long it takes you, and

subtract that time from 90 minutes. It would take at most 15 or 20 minutes to read the indictment, so Mr. Sears gave us reason why he thought we should indict for over an hour.

Q. Was a court reporter present on April 21?

A. No, sir.

Q. Was a court reporter present on April 20?

A. No, sir.

Q. Who directed that no court reporter be present on these dates?

A. I do not know.

Q. Did Mr. Sears or other assistant special state's attorney address the jury on any other occasion when no court reporter was transcribing the record?

A. Yes, frequently.

Q. Under what circumstances did Mr. Sears and his assistant address the jury when no court reporter was transcribing the record?

A. Frequently, Mr. Sears and his assistants would say "off the record", and the court reporter would stop operating his machine. Other times Mr. Sears would give the court reporter a wave of his hand, and the court reporter would stop operating his machine.

Q. Was this done when witnesses were testifying?

A. The only time this was not done was when Mr. Hanrahan was testifying. A number of times Mr. Sears would say "off the record" or give the hand signal to the court reporter, but Mr. Hanrahan would always contradict Mr. Sears and tell the court reporter to make sure that everything was part of the record.

Q. When did Mr. Hanrahan first testify before the grand jury?

A. It was about the end of April, 1971.

Q. Did this "going off the record" occur during Capt. Mulchrone's testimony?

A. It occurred frequently during Capt. Mulchrone's testimony. It also occurred during the testimony of almost every other witness from the time we started up until the time Mr. Hanrahan testified.

Q. Can you tell me what was said during these periods when the court reporter was not transcribing?

A. Yes, sir. It was when the court reporter was not operating his machine that Mr. Savage said Marian Fisher was a whore, a slut, and a liar.

Q. Did he call he that to her face?

A. Yes, sir, he did.

Q. Did the grand jurors hear Mr. Savage use the terms "whore, slut, and liar"?

A. Yes, sir.

Q. Do you recall any other instances?

A. Yes, sir. It was when the court reporter was not operating the machine that Mr. Sears told us Doc. Satchel had a perfect right not to testify and to tell us he was a professional revolutionary.

Q. Are there any other instances you can recall?

A. Yes, sir. It was off the record when Mr. Sears and Mr. Cedarquist told us what witnesses' testimony was and was not important.

Q. Are there any other instances you can recall?

A. It was off the record when Mr. Sears told us Judge Power was wrong and when Mr. Sears summarized what

each witness who had testified before the Federal Grand Jury would say and why we should not call these witnesses in to testify before us.

Q. Are there any other instances you remember?

A. A number of times Mr. Sears told us we should believe Mr. Zimmer when Mr. Zimmer said that one shot was fired by the Panthers and the rest by the police.

Q. Are there any other instances?

A. I remember what Mr. Savage told us off the record about why we should believe Bell's testimony at the Peoples inquest.

Q. What did Mr. Savage tell you?

A. Well, Trulock, Satchel, and Bell had refused to answer Mr. Savage's questions. Mr. Savage read us Bell's testimony from the Peoples inquest. There was an argument off the record about whether or not Bell's testimony was believable and whether or not Bell's testimony at the People's inquest was under oath, and we jurors decided that it was not under oath. Then Mr. Savage explained that because Bell and the other Black Panthers believed in the People's inquest, they believed they were under oath and that is why he was reading their testimony to us and that it was just a technicality that the Panther's testimony before the People's inquest was not a legal oath. Mr. Scott had an argument with Mr. Savage about this, but Mr. Savage read the testimony anyway.

Q. Did the grand jury ever investigate the Black Panther Party?

A. No, sir.

Q. What did the grand jury investigate?

A. State's Attorney Hanrahan, the State's attorney's police, the Chicago police and what happened in the apartment the night Hampton and Clark were shot.

Q. Who determined what witnesses were to be brought before the grand jury?

A. Mr. Sears did.

Q. Did grand jurors ever ask to have any other witnesses brought in who were not selected by Mr. Sears?

A. Yes, sir.

Q. What other witnesses were requested by grand jurors?

A. Investigator Clark, Marlin Johnson were two. There wert a couple of others, but I can't remember.

Q. Did Mr. Sears bring these witnesses in?

A. No sir, he did not.

Q. What were the circumstances under which Mr. Sears did not bring in these witnesses?

A. He told us that these witnesses' testimony was not important, and he gave his reasons why it was not important, and he told us he did not think these witnesses should be brought in. Some of the jurors said they still wanted to hear these witnesses, so Mr. Sears said he would bring the witnesses in only if a majority of the grand jurors wanted to hear the witnesses.

Q. What occurred then?

A. The jury would vote; and if 12 jurors then sided with Mr. Sears, the witness was not called.

Q. How were witnesses selected to appear?

A. If Mr. Sears wanted the witness, he got him in. If a juror wanted a witness and Mr. Sears wanted the witness, Mr. Sears brought the witness in; but if Mr. Sears

didn't want the witness, he told us why the witness should not be called, and then he would have us vote on whether or not to call the witness.

Q. Did all police witnesses sign immunity waivers?

A. No, sir.

Q. Who decided whether or not a witness was given an immunity waiver to sign?

A. Mr. Sears and his staff.

Q. Did the grand jury ever decide who should be given an immunity waiver and who should not?

A. No, sir.

Q. Dd any police officer testify who had not signed an immunity waiver?

A. Yes, sir.

Q. What police?

A. Three IID Sergeants, some of the uniformed policemen who came to the scene shortly after the raid, and Superintendent Conlisk. There may have been a few others. I don't remember now.

Q. Do you know the circumstances under which Supt. Conlisk did not receive an immunity waiver to sign?

A. Yes, sir. Mr. Sears admitted that he did not want Supt. Conlisk to sign an immunity waiver.

Q. What were the circumstances under which Mr. Sears said that Supt. Conlisk had not received an immunity waiver?

A. Well, you see, Supt. Conlisk's name was not in the big conspiracy indictment which Mr. Sears had originally presented to us on April 21. The jurors voted to add his name to the indictment. Mr. Sears was very upset because Supt. Conlisk's name had been added.

Q. By the way, what kind of treatment did Supt. Conlisk receive from Mr. Sears when he testified?

A. Pleasant, friendly, and courteous.

Q. Will you describe what occurred when Supt. Conlisk testified.

A. Supt. Conlisk was very careful to point out that all he did was give an assignment to Mulchrone; and that if anything was wrong, it was the fault of Mulchrone and tht men working under Mulchrone.

Q. What type of a witness did Supt. Conlisk make?

A. Well, Mr. Coghlan, I don't want to be uncharitable to Supt. Conlisk; but it seemed to be a rather interesting coincidence to me that Mr. Sears was nice to Supt. Conlisk; Mr. Sears decided in advance that Supt. Conlisk should not be required to sign an immunity waiver; Mr. Sears told us we could not name Supt. Conlisk as a defendant because Supt. Conlisk had not been asked to sign an immunity waiver. Then Supt. Conlisk says Capt. Mulchrone is responsible for his subalterns; but he, Supt. Conlisk, is not responsible for Capt. Mulchrone. I have my own ideas about Supt. Conlisk and Mr. Sears. Let's just say that I'm glad I don't have to work for that kind of a boss.

Q. What kind of a witness did Capt. Mulchrone make?

A. I'd say he made a pretty good witness. He took full responsibility for the investigation made by the men who worked for him. People work under me too, and I know something about the responsibility expected of superiors. If you don't mind, I would just as soon get off the subject of Supt. Conlisk.

Q. What kind of witness did Mr. Hanrahan make?

A. I think he made a pretty good witness. He gets hot under the collar pretty quickly, and he had some good fights with Mr. Sears. I liked the way he accepted responsibility for the men who worked for him. He and Capt. Mulchrone were alike in this regard.

Q. Do you know what people received immunity waivers to sign and what people did not?

A. Yes, sir.

Q. What people were sent immunity waivers by Mr. Sears?

A. Mr. Hanrahan, the States Attorney's policemen who were on the raid, Capt. Mulchrone, Sgt. Meade, Mr. Jalovec, Mr. Meltreger, Mr. Sorosky, Mr. Sadunas, Mr. Koludrovic, and Mr. Evanian.

Q How many of the persons who received immunity waivers actually testified?

A. I believe it was six.

Q. Who were they?

A. Mr. Hanrahan, Capt. Mulchrone, Mr. Sorosky, Mr. Meltreger, Mr. Jalovec, and Mr. Evanian.

Q. How do you know that persons other than these six had received immunity waivers but had not signed them?

A. Mr. Sears told us.

Q. What did Mr. Sears say about the persons that refused to sign immunity waivers?

A. Mr. Sears told us that he had sent immunity waivers to the persons who he believed were targets of his investigations.

Q. And who did he say were the targets of his investigation?

A. The States Attorney's police, the States Attorney, and the Chicago Police Department.

Q. Did Mr. Sears say that the Panthers were the targets of his investigation?

A. No, he did not. In fact, he took the Panthers before Judge Power to ask Judge Power to give the Panthers immunity from prosecution, but Judge Power refused. Judge Power said we were to investigate the Black Panthers too.

Q. Did you ever read the intelligence reports on the Black Panthers which Capt. Mulchrone brought to the grand jury room on his second visit?

A. No, sir.

Q. What are the circumstances under which you did not read them?

A. Mr. Sears took possession of them, and sometime later Mr. Collins told us what portions of the intelligence reports concerned us. Mr. Collins never read any of the intelligence reports to us. He just gave his summary of what he said was important.

Q. What, if anything else, did Mr. Sears say about the immunity waivers?

A. He talked about the immunity waivers about a dozen times during the course of our investigation. He frequently reported on his progress and told us what witnesses had refused to sign immunity waivers.

Q. Do you know why some police received immunity waivers and some police did not receive immunity waivers?

A. Mr. Sears said some of the police were the targets of his investigation and some police, in his opinion, did not do anything wrong.

Q. Were any witnesses that Mr. Sears said had refused to sign immunity waivers indicted?

A. Without exception, every person who refused to sign an immunity waiver was indicted.

Q. Was anything said about why certain witnesses had refused to sign immunity waivers?

A. Yes.

Q. What was said?

A. Mr. Sears said many times that the witnesses who had refused to sign immunity waivers did so because they knew that their testimony would be used against them when they were indicted.

Q. Do you know whether or not the persons who were indicted received a fair and impartial investigation?

A. I know the persons who were indicted did not receive a fair and impartial investigation.

Q. Do you know whether or not any grand juror was improperly influenced by Mr. Sears?

A. Mr. Coghlan, I don't know quite how to answer that question.

Q. Why not?

A. Well, nobody thinks he was improperly influenced. For example, I like to think that nobody could improperly influence me, and I'll bet every other grand juror feels the same way. Any grand juror that was improperly influenced would be the last one to know it. As far as I am concerned, that's what undue influence is all about.

Q. Do you think anyone tried to influence you improperly?

A. Yes, sir.

Q. Who do you think tried to influence you improperly?

A. Mr. Sears and his assistants.

Q. In what way did they try to influence you improperly?

A. Look, Mr. Coghlan, we were meeting regularly for over six months. I can't remember every little thing Mr. Sears and his assistants did and said to get us jurors to believe these policemen were criminals. It was one little thing after another, day after day. Any one or two of these things could have been an accident, but after a while it is no accident. Even a dog can tell the difference between when he's been stumbled over and when he's been kicked. From the very start Mr. Sears and his assistants were out to indict law enforcement officials and only law enforcement officials. Did you interview other jurors.

Q. I've interviewed most of them.

A. Well, then, you know some of them think Mr. Sears is a fine fellow.

Q. That's right.

A. Did you start asking them questions, Mr. Coghlan, about the things Mr. Sears did and said?

Q. Yes, I did.

A. Well, you've talked to the other jurors. Don't you agree that they're decent people who took this whole thing seriously and tried to do a good job?

Q. Yes, I do.

A. I'll bet there's no big dispute about what Mr. Sears did and said. I'll bet almost all of the grand jurors will tell you the truth. It's just that some grand jurors

think that the things Mr. Sears did and said were proper and other grand jurors think that the things Mr. Sears did and said were not proper. I happen to think that many of the things Mr. Sears did and said were not proper.

Q. Well, Mr. Murtaugh, that's what we have judges for. Eventually a judge will have to decide whether or not the things Mr. Sears said and did were improper or proper.

A. That's o.k. with me, Mr. Coghlan. I guess it really isn't too important whether us jurors think Mr. Sears was proper or improper. We can tell you what he did and what he said, and then the judge can decide whether or not he was wright or wrong.

Q. How did the grand jury decide what indictments it wanted to vote upon?

A. The grand jury didn't decide what indictments it wanted to vote upon. The grand jury voted on all indictments Mr. Sears told us to vote on and no others.

Q. What, if anything did you do when you felt an indictment had been improperly obtained on April 21.

A. I did the same thing Clara Goucher did. I went to see Judge Power the next day. I told Judge Power this thing was wrong. I told Judge Power that Mr. Sears was out to get policemen and only policemen. I told Judge Power that the policemen and the States Attorney didn't receive a fair shake, and I asked Judge Power what else I could do since I felt this way.

Q. What did Judge Power tell you?

A. He listened to my complaints, and he told me that there was nothing else I could do except remain in with the grand jury and cast my vote the way I felt was right.

Q. Were you present in Judge Power's courtroom when Mr. Balla presented the true bill in court?

A. Yes, sir.

Q. Did you say anything to Judge Power at that time?

A. No, sir.

Q. What were the circumstances under which you did not say anything when Mr. Balla presented the indictment in Judge Power's courtroom?

A. Look, Mr. Coghlan, I went to Judge Power's chambers and protested Mr. Sear's conduct a couple of times before, and I asked Judge Power what I could do. Judge Power told me all I could do was express my concern in the grand jury room by what I said and how I voted. I did that. Judge Power said I couldn't say anything else outside the grand jury room. I believed Judge Power. I had already registered my protest to Judge Power before Judge Power accepted that indictment, so Judge Power knew how I felt at the time Mr. Balla gave him the indictment.

Q. How did Mr. Sears conduct himself between April 21 and June 24?

A. He was much more careful of the things he said. So were his assistants.

Q. What about the things he did?

A. Oh, he continued to show by gesture, facial expression, laughter, and tone of voice that he thought the police were wrong; but he was careful not to say any more.

Q. Is the true bill that was presented to Judge Power in June the same indictment that was voted a true bill on April 21?

A. It is not the same actual piece of paper that we had in the jury room, but it is almost the same thing.

Q. What do you mean by that?

A. Well, when the indictment was brought to us on April 21, it did not have the name of Supt. Conlisk typed in. We jurors added that name. When the indictment was brought back again in June, some of the pages at least must have been retyped because Supt. Conlisk's name had been typed in.

Q. Did Mr. Sears appear before the grand jury on June 23 and June 24?

A. Yes, sir.

Q. In your opinion, was the indictment that was re-voted on June 23 or June 24 properly voted?

A. No, sir.

Q. Why not?

A. Mr. Sears made no attempt to undo all the harm he had done for over six months. All of the things he and his assistants had done were still with us in that jury room and nothing had been done to undo them. As far as I'm concerned, I still knew that Mr. Sears was urging us to indict.

Q. On April 21 did any grand juror or anybody else ask Mr. Sears to give his opinions on why you should vote indictments?

A. No sir.

Q. Did any grand juror or anybody else, to your knowledge, inform Mr. Sears that the advice he gave on April 21 was wanted by the jury?

A. No, sir.

Q. What, if anything else, did Mr. Sears say on April 21st?

A. He told us that the evidence was overwhelming, and that we should vote true bills. He also said that he had other evidence that also indicated the police were guilty but that this evidence would be produced at the trial.

Q. Is there anything else you want to add? That's about all the questions I have at this time. Thank you for talking to me, Mr. Murtaugh.

A. That's o.k., Mr. Coghlan, I really can't think of anything I should add to this.

(signed) william j. murtaugh.

State of Illinois }
County of Cook } ss

William L. Murtaugh, being first duly sworn upon his oath deposes and says that he has read the above and foregoing transcript of a statement which he gave to John P. Coghlan on September 6, 1971, and that said statement to John P. Coghlan is true in substance and in fact.

(signed) william j. murtaugh.

Subscribed and Sworn to before me this 15th day of September, 1971. elizabeth a. zib, Notary Public, Cook County, Illinois. My commission expires February 26, 1974."

"Page 1.

Statement of Clara Goucher given to John P. Coghlan on August 31, 1971.

My name is Clara Goucher. I live at 47 N. Waller Street, Chicago, Illinois. I am one of the grand jurors who heard evidence on the shooting of Fred Hampton and Mark Clark.

On April 20th, 1971 we voted no bills on all indictments Mr. Sears had presented to us. The day before Mr. Sears had said that all the witnesses he wanted to present had been heard and that we would vote on indictments the next day which was April 20, 1971.

On April 20, 1971 he read through a number of indictments to us without comment. He then left the room and we voted No Bills to each and every indictment. When Mr. Sears then came back in and he was told all were No Bills he expressed his displeasure by frowning. Even though it was still very early that day Mr. Sears asked our foreman to recess for

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the day and come back again on April 21st. It was obvious to all of us that Sears was unhappy with the No Bills.

When we came back on April 21, 1971 Mr. Sears handled things entirely differently. He started out by saying, "I'm not going to make the same mistake I made yesterday." He said that he had hoped it would not be necessary for him to talk to us at this time but Mr. Sears said it appeared it was necessary that he talk to us at this time. He sat down and then Mr. Sears talked for 90 minutes. He told us that he wasn't pleased with our voting No Bills the day before. Mr. Sears said he didn't understand how we could have voted No Bills the day before.

He then started giving us the reasons why we should indict each person he had named in an indictment.

Some of the reasons which

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Mr. Sears then stated to us for indicting and voting true bills then were:

(1.) Sears said Mulchrone and Meade and others had tried to hide evidence.

(2.) Sears said other policemen had deliberately confused the guns.

(3.) Sears said Jalovec had sent Meltreger to the IID to protect the police and to hide the truth.

(4.) Sears said the reason that some police officers didn't sign immunity waivers was because those police officers knew very well their testimony would be used against them at their trial. (by the way, Sears had been making this same statement about the police who refused to sign immunity waivers at least 10 times before at various dates.)

(5.) Sears said after each count on the indictment, "Now you do what you want but how, how, can you see this any different way?".

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(6.) Sears said that Doc Satchell had a perfect right to tell us that he (Satchell) was a professional revolutionary and wouldn't testify.

(7.) Sears said that an indictment is not saying people are guilty and that it does defendants no harm because they will eventually be cleared if they are not guilty.

(8.) He said that if there was just a slight possibility that the defendants were guilty we should vote true bills.

(9.) He showed his displeasure with the way we voted the day before by his gestures, tone of voice and facial expressions.

That's all the reasons I remember now but if I could get back the notebook Mr. Sears took I could check my notes and maybe remember more.

After Sears talked to us for 90 minutes on April 21, 1971 we deliberated a true bill was voted.

Then Mr. Sears came in and he was an entirely

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different person. He (Sears) said, "I want to commend you on your good work today." He was smiling and expressing his pleasure also by his tone of voice, facial expressions and gestures.

All during the course of this grand jury Mr. Sears expressed his disbelief with gestures, facial expressions and tone of voice whenever Hanrahan, Mulchrone, and other police witnesses testified. He (Sears) was courteous and polite to Panthers but not to police.

At the intermission on one of the days that Capt. Mulchrone testified Mr. Collins said to one of the jurors in a sarcastic tone, "If this is the kind of police department we've got we are all in serious trouble." Capt. Mulchrone heard Collins say it too and challenged Mr. Collins and Mr. Sears and Sears wouldn't explain why Collins remark was proper. Also, Sears

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treated Mulchrone like dirt. He (Sears) would walk away from Mulchrone and laugh at his answers to show that he didn't believe Mulchrone. Sears would tell Mulchrone to answer questions only yes or no and the first time Mulchrone was testifying and trying to answer he (Mul-

chrone) and Sears had several arguments. Sears would not let Mulchrone explain a thing and Sears said "I run this grand jury." He emphasized the word, "I".

Sears would frequently tell the court reporter to go off the record by saying, "This is off the record" and then he would give us his opinions about whether we should believe the person or not who had been testifying. The witness would not be in the room when Sears was telling us "off the record" whether we should believe the witness or not.

On April 21, 1971 after the true bill was voted Mr. Sears said we should

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recess until the afternoon of April 22, 1971 because Sears said we had more indictments to vote. On the afternoon of April 21, 1971 and the early morning of April 22, 1971 I was so upset by Mr. Sears conduct that I just couldn't stand by and do nothing. The only way I could do anything was to personally protest Mr. Sears conduct to Judge Power and I did go to see Judge Power and protested on April 22, 1971. I couldn't think of anything else I could do.

You told me your name was John P. Coghlan and that you were a lawyer defending Sgt. Meade and Captain Mulchrone. You told me you didn't care who I helped or who I hurt so long as I told you the truth. You told me that you had been in Judge Power's courtroom this morning and that Judge Power said it was OK for us grand jurors to talk to you defense

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lawyers so long as we did not go into what was said while the grand jury was alone deliberating or what our voting

was. After reading this eight page statement and finding it contains only the truth the way I told you I will sign this page and put my initials on the first seven pages.

(signed) clara b. goucher"

"State of Illinois
County of Cook ss.
Joseph M. Zichitella

of the City of Berwyn, County of Cook and State of Illinois, being duly sworn, deposes and says that:

I was one of the grand jurors who served on the Grand Jury which investigated the shooting of Fred Hampton and Mark Clark. You told me your name was John P. Coghlan and that you were a lawyer representing Capt. John Mulchrone and Sgt. John Meade. I have read the photocopy of the eleven page sworn statement of Juror William L. Murtaugh, and I have identified this statement by putting my initials on each page. I was not one of the jurors who complained to Judge Power so Mr. Murtaugh's statement about complaining to Judge Power do not apply to me. Except for that fact Bill Murtaugh's statement is true. If you were to ask me the same questions you asked Bill Murtaugh my answers would be exactly the same. I can't think of anything I should add to his statement.

And further this affiant says not.

[SEAL]

(signed) joseph m. zichittella

Subscribed and sworn to before me this 16th day of September, 1971.

(signed) elizabeth a. zib

Notary Public, Cook Ciunty, Illinois."

"State of Illinois
County of Cook ss.

Harvey B. Scott, Jr.

and State of Illinois, being duly sworn, deposes and says that;

I was one of the grand jurors who served on the Grand Jury which investigated the shooting of Fred Hampton and Mark Clark. You told me your name was John P. Coghlan and that you were a lawyer representing Capt. John Mulchrone and Sgt. John Meade. I have read the photocopy of the eleven page sworn statement of Juror William L. Murtaugh, and I have identified this statement by putting my initials on each page. I was absent on April 20, 1971, the day all the no-bills were voted. When Mr. Sears started scolding us on April 21st I said to some of the jurors near me, "You must have misbehaved yesterday; we're getting a scolding." I was one of the jurors who went to Judge Power to protest Mr. Sears conduct too. All I know about what happened April 20th is what the others told me. Everything else happened just the way Mr. Murtaugh tells it in his statement. I saw and heard the same things Mr. Murtaugh's statement says he saw and heard so if you asked me the same questions you asked Mr. Murtaugh I'd have to give you the same answers Mr. Murtaugh gave you in his statement. I have the same opinions Mr. Murtaugh has in his statement too. It's OK with me if you use this sworn statement in court too. It's all true.

And further this affiant says not.

[SEAL]

(signed) harvey b. scott, jr.

Subscribed and sworn to before me this 16th day of September, 1971.

(signed) elizabeth a. zib
Notary Public, Cook County, Illinois."

APPENDIX D

THE FOLLOWING ALLEGATIONS CONSTITUTE ISSUES OF FACT IN THAT THEY HAVE BEEN DENIED ABSOLUTELY BY ONE OR MORE OF THE AFFIDAVITS FILED BY THE SPECIAL STATES ATTORNEY OR THE ASSISTANT SPECIAL STATES ATTORNEYS:

1. Sears expressed his displeasure with witnesses by his gestures, tone of voice and by his contemptuous laughter.

2. On April 21, 1971 Sears showed his displeasure with the No Bills voted the day before by his facial expressions, tone of voice and gestures.

3. Sears said that he didn't understand how the grand jury could not have voted a true bill.

4. Sears gave reasons to the grand jurors why they should indict certain defendants.

5. Sears said that certain policemen had tried to hide evidence.

6. Sears said that certain policemen had deliberately confused the guns.

7. Sears said that Jalovec, Meltreger and Sorosky had gone to the Internal Investigations Division of the Chicago Police Department to protect the police and to hide the truth.

8. Sears said that an indictment does not do a defendant any harm.

9. Sears said, "How, how, can you see this any other way?"

10. Sears said that the grand jurors should vote a true bill if there was a slight possibility of guilt.

11. Collins said, "If this is the kind of police department we have, we're all in serious trouble."

12. Sears treated Mulchrone like dirt.

13. Sears said that the persons who declined to sign immunity waivers did so because they knew their testimony would be used against them upon a trial.

14. Sears took Clara Goucher's notebook.

15. Sears was a different person after the grand jurors had voted a true bill.

16. Sears commended the grand jurors for doing a good job after they had voted their first true bill.

17. On April 21, 1971 Sears showed his pleasure with true bills by his gestures, tone of voice, and facial expressions.

18. Sears said, "I run this grand jury."

19. Sears was discourteous to Captain Mulchrone.

20. Sears asked the grand jurors to recess on April 20, 1971 after they had voted no bills.

21. On April 21, 1971 Sears said he had hoped it would not be necessary to talk to the grand jurors.

22. Sears frequently caused the court reporter to go off the record except when Hanrahan was testifying.

23. Sears told the grand jurors what witnesses to believe and what witnesses not to believe.

24. Cedarquist told the grand jurors what witnesses to believe and what witnesses not to believe.

25. Sears argued with jurors on April 21, 1971.

26. Sears made jurors look dumb on April 21, 1971.

27. Sears said to the grand jury, "The only way to see it is that the police are guilty".

28. Sears said that the evidence of guilt was overwhelming.

29. Sears told the grand jurors on April 21, 1971 that they had done a bad job by voting no bills the day before.

30. Sears said that an indictment was only a piece of paper.

31. Sears said not to worry about voting a true bill.

32. Sears said, ". . . when the newspapers and TV from all over the world come here to Chicago, I will stand up and be the first to say 'these men are innocent'. It is just that we all felt the public should have a chance to know what went on by hearing it at a public trial because grand jury proceedings are secret' ".

33. Sears said the police and the states attorneys did wrong.

34. Sears volunteered his opinions to the grand jurors on issues of fact.

35. Sears said the grand jurors should believe the witness, Zimmer.

36. From the very beginning the special states attorneys were out to indict law enforcement officials and only law enforcement officials.

37. Sears refused to let Mulchrone explain answers.

38. Sears scolded the grand jurors for voting no bills.

39. Sears told the grand jurors that he had other evidence that also indicated the police were guilty but that this evidence would be produced at the trial.

THE FOLLOWING ALLEGATIONS ARE ADMITTED EITHER SPECIFICALLY OR BECAUSE NO REFERENCE WAS MADE TO SAID ALLEGATIONS IN ANY OF THE AFOREMENTIONED AFFIDAVITS OF THE SPECIAL STATES ATTORNEY OR THE ASSISTANT SPECIAL STATES ATTORNEYS:

1. Sears did not comment on the proposed indictment before the grand jurors voted on April 20, 1971.

2. Sears read the indictment to the grand jurors on April 21, 1971 including each sub-section alleging overt acts.

3. Savage argued with Grand Juror Scott on the propriety of Witness Bell's "Peoples'. Inquest" testimony being read to this grand jury.

4. Except for the events of December 4, 1969 the grand jurors never investigated the Black Panther Party.

5. Sears summarized the federal grand jury testimony of witnesses who did not testify at these state grand jury proceedings.

6. Sears told the grand jurors why the testimony of missing witnesses was not important.

7. On April 20, 1971 no true bills were voted by the grand jury.

8. On April 21, 1971 only true bills were voted by the grand jury.

9. On April 21, 1971 Sears said, "I'm not going to make the same mistake today that I made yesterday."

10. Sears prepared all indictments without any prior vote or direction by the grand jury.

11. The grand jurors voted only on indictments which had been previously prepared by the special states attorney.

12. Sears did not cause Witness Clarke to appear before the grand jury although some grand jurors requested that this be done.

13. Sears told the grand jurors that the witness, Clarke's testimony was not important.

14. Sears did not cause Witness Marlin Johnson to appear before the grand jury although some grand jurors requested that this be done.

15. Sears told the grand jurors that Marlin Johnson's testimony was not important.

16. Savage read to this grand jury the statements of witnesses who had appeared at the "People's Inquest".

17. Sears told the grand jurors that Doc Satchel had a perfect right to tell the grand jurors that he was a professional revolutionary and wouldn't testify.

18. Sears told Mulchrone to answer questions "yes" or "no".

19. No court reporter was present on April 20, 1971.

20. No court reporter was present on April 21, 1971.

21. Sears and assistant special states attorneys frequently addressed the grand jury on other occasions when no court reporter was transcribing the record.

22. Only Sears determined which witnesses were to be called to testify before the grand jury.

23. If Mr. Sears wanted the witness, he got him in. If a juror wanted a witness and Mr. Sears wanted the witness, Mr. Sears brought the witness in; but if Mr. Sears didn't want the witness, he told the grand jurors why the witness should not be called, and then he would have the grand jurors vote on whether or not to call the witness.

24. Sears told the grand jurors that he did not want Superintendent Conlisk to sign an immunity waiver.

25. Sears frequently told the grand jurors which witnesses had received immunity waivers but had not signed them.

26. Sears told the grand jurors he had sent immunity waivers to the persons whom he believed were targets of his investigation.

27. Assistant Special States Attorney Collins did not read some of the Chicago Police Department Intelligence Reports on the Black Panther Party to the grand jury.

28. Grand Juror Murtaugh first protested Sears misconduct to Chief Judge Joseph A. Power on April 22, 1971.

29. Grand Juror Goucher first protested Sears misconduct to Chief Judge Joseph A. Power on April 22, 1971.

30. Chief Judge Joseph A. Power told Grand Juror Murtaugh that all he could do was express his concern in the grand jury room by what he said and how he voted.

31. Chief Judge Joseph A. Power told Grand Juror Murtaugh he couldn't say anything else outside the grand jury room.

32. Assistant Special States Attorney Collins summarized certain Chicago Police Department Intelligence Reports on the Black Panther Party to the grand jury.

THE FOLLOWING ALLEGATIONS ARE ANSWERED IN ONE OR MORE OF THE AFFIDAVITS OF THE SPECIAL STATES ATTORNEY AND THE ASSISTANT SPECIAL STATES ATTORNEYS BY WAY OF NEGATIVE PREGNANT AND THE MATERIAL ALLEGATIONS OF SAME SHOULD THEREFORE BE DEEMED ADMITTED:

1. Sears was off the record when he told the grand jurors that Judge Power was wrong.

2. Sears laughed at Captain Mulchrone five to ten times.

3. Sears frequently instructed the court reporter to go off the record by saying "off the record" and by using hand signals.

4. The day before Mr. Sears had said that all the witnesses he wanted to present had been heard and that the grand jurors would vote on indictments the next day which was April 20, 1971.

5. There were twenty interruptions in the reading of the indictment on April 21, 1971.

MISCELLANEOUS:

1. The affidavit of Wayland B. Cedarquist admits a colloquy occurred between himself and a grand juror on the day that Captain Mulchrone testified. Mr. Cedarquist admits in part and denies in part the allegations made in the Murtaugh affidavit that Cedarquist said, "If this is the kind of police department we've got, we're all in serious trouble". None of the other affiants choose to comment in their affidavits as to what was said at that time.

2. None of the aforesaid affidavits estimate the length of Mr. Sears address to the grand jury on April 21, 1971 at a period of time less than thirty minutes.

3. Also to be deemed admitted is the unverified statement in the Motion to Dismiss filed by Defendants Groth et al. that Sears told the grand jurors that Illinois statutes requiring them to hear witnesses were "unconstitutional".

APPENDIX E

IN THE SUPREME COURT OF ILLINOIS

PEOPLE ex rel. SEARS, Petitioner,	
vs.	No. 44781
HON. PHILIP ROMITI, et al, Respondents.	

PETITION FOR REHEARING OF EDWARD V. HANRAHAN

EDWARD V. HANRAHAN files this petition for rehearing not only to secure his constitutional rights and those of the other defendants in this case, but also to preserve the constitutional right of every person to freedom from improper influence by the prosecutor in grand jury proceedings. Justices Goldenhersh, Kluczynski and Ward in their dissenting opinion recognized the danger to individual liberty inherent in the general principle established by the majority opinion by stating: "The importance of the question [presented to us] goes far beyond this case."

The majority opinion permits any prosecutor, secretly and outside the presence of a court reporter, to revile a grand jury witness, to exhort grand jurors to indict, to deceive them regarding the law, the evidence and defendants' rights; to argue and offer opinions — all to procure the indictment *he* wants.

Now, any prosecutor is guaranteed that he need not fear discovery or accountability for his unlawful conduct — even when some of the grand jurors are so repelled

thereby that during the course of the proceedings they complain to the presiding judge, and even though, after return of the indictment, several grand jurors give sworn statements which show that such misconduct caused the indictment.

To properly evaluate how the majority opinion precludes any remedy for the enormous wrong done the defendants, the unique facts of this case must be understood: an important portion of the prosecutor's misconduct complained of occurred when, at the command of the prosecutor, no court reporter was present to transcribe proceedings before the grand jury. Because there is no transcript for those days, it is impossible to prove what occurred without the testimony of the grand jurors. But now such testimony cannot be used in this case and can never be used in any future case for any purpose.

Because justice is its basic concern, the law has always imposed upon a prosecutor the duty of protecting the innocent from criminal prosecution and not only prosecuting the guilty. Likewise, by statute a grand jury has the corresponding duty to *independently* determine whether there is probable cause to indict and thus to shield the innocent from the overzealous or unscrupulous prosecutor:

> "... . Historically, this body [the Grand Jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." (*Wood* v. *Georgia*, 370 U.S. 375, 390).

That is the very reason the Illinois Constitution requires indictment by grand jury.

These fundamental concepts of fairness are now demolished. The grand jury becomes a tool of the prosecutor contrary to this Court's opinion of June 23, 1971 in this very case:

> "... the grand jury is an integral part of the court and not the tool of the prosecutor." (*People* v. *Sears*, 49 Ill. 2d 14, 36).

The awesome power of any prosecutor is put beyond judicial scrutiny. Knowing that his conduct before the grand jury is not subject to judicial review, a prosecutor now can do whatever he wants. He can exert any kind of influence upon the grand jurors, who are laymen, in order to procure an indictment. He can make the accused the victim of the very constitutional device which was designed for his protection. Thus, the grand jury now becomes "an engine of oppression" as recognized by the Court of Appeals in *Schmidt* v. *U. S.*:

> " 'It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious, or overzealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead

> of that protection of 'the citizen against the unfounded accusation, whether it comes from the government or be prompted by partisan passion, or private enmity' . . . which it was primarily designed to provide, may become an engine of oppression and a mockery of justice." (115 F 2d 394, 397).

No State's Attorney, true to his oath as a lawyer and as a public official, wants that power; nor should he have it.

ARGUMENT

The decision is based on several grounds:

(1) the over-riding necessity for secrecy of grand jury proceedings, (2) the interpretation that Section 112-6(b) prohibits examination of grand jurors and (3) the empty consolation that it matters not how the indictment may have been procured because "an innocent person . . . can always vindicate himself in a trial upon the merits." None of these grounds affords justice because, (1) each is contrary to this court's opinion of June 23, 1971 herein; (2) each deprives the defendants of any remedy for the enormous wrong done them; and, (3) each converts the grand jury from the protector to the oppressor of the accused.

1. SECRECY OF THE GRAND JURY

Secrecy of the grand jury proceedings has never been absolute. Even in the pre-indictment stage of this case, this court itself said:

> "It is therefore apparent that the veil of secrecy which petitioners' contend enshrouds the proceedings before the grand jury has been rendered considerably less opaque than in former years." (49 Ill. 2d 34-5).

By that very language this court recognized that secrecy of the grand jury should not be used as a shield to hide abuse of due process or prosecutor misconduct from ju-

dicial scrutiny. The Special Prosecutor has conceded that in all his prior pleadings and in oral argument, as recognized by this court:

> "The substance of petitioners' argument in support of the issuance of the writs is that although *admittedly Sears' conduct before the grand jury is not above judicial scrutiny*, such scrutiny may be invoked only after indictment . . ." (Emphasis supplied). (49 Ill. 2d 34).

After indictment there is no reason for secrecy. As Justice Schaefer said in *People* v. *Johnson*:

> "The policy of grand jury secrecy is intended (1) to prevent the accused from escaping before he is indicted and from tampering with witnesses; (2) to protect an accused person who is not indicted against unwarranted exposure; (3) to encourage uninhibited deliberations by the grand jurors; and (4) to encourage witnesses to testify before the grand jury without fear of public disclosure. 8 Wigmore on Evidence, 3rd ed., sec. 2360.
>
> "None of those reasons is applicable in the present case, where the accused seeks only the transcript of the testimony of a witness who has testified at the trial. Plainly the disclosure of grand jury minutes after an indictment is returned and the case proceeds to trial will involve no danger of flight by the accused and no risk of damage to his reputation. Nor is it to be expected that he will tamper with a witness who has already testified against him. There will be no impediment to future grand jury deliberations since such deliberations will remain secret. Finally, it is in no sense unfair to a witness who testified at the trial to reveal his previous testimony." (31 Ill. 2d 602, 605-6).

The same reasoning applies with equal force to all post-indictment proceedings. (*Burkholder* v. *State*, Alas. Sup.

Ct. No. 30, 1971, 10 Cr. L. 2205; Ill. Sup. Ct. Discovery Rule 412).

Furthermore, in *People* v. *Johnson*, this court recognized the propriety of receiving grand jurors' testimony regarding matters which occurred in proceedings before the grand jury:

> "In *Bressler* v. *People*, 117 Ill. 422, for example, a grand juror was permitted to testify to the witness's prior inconsistent statement before the grand jury. What was said there applies equally to the case before us: 'When the indictment is returned, and the defendant arrested and placed upon trial, neither the statutory nor common law reasons for secrecy can apply. There can be no reason, then, why evidence given before a grand jury should not be made known and proved, if the ends of justice require it. A contrary course would tend to defeat instead of to promote justice, and be directly in opposition to the tendency of the age, which is to enlarge, rather than to contract, the sources of evidence.'" (117 Ill. at 437).

The *Bressler* case permitted that procedure. Again, in *Granger* v. *Warrington*, 8 Ill. 299, 310, the Illinois Supreme Court allowed a grand juror to testify, saying:

> "In many cases that may readily be supposed, the members of the grand jury would be the only witnesses to prove facts that are necessary to be established, and without whose testimony there might be a failure of justice."

Correspondingly, to prevent a failure of justice here, the hearing ordered by the trial court herein should be permitted.

Under current Discovery Rules, this court has completely removed from secrecy all grand jury testimony concern-

ing the accused. That disclosure is now automatic — without the showing of any need therefor. (Supreme Court Rule 412). *A fortiori* the court-ordered hearing sought here (where the critical grand jury proceedings were *not* transcribed) should likewise be permitted, especially in view of the nature and the volume of abuse of process and prosecutor misconduct alleged in the procuring of this indictment.

In its most recent ruling on this subject, the Court of Appeals (5th Circuit) held that, where there was no transcript of grand jury proceedings, the District Court must conduct an "adversary hearing" to determine what occurred before the grand jury so that the court could fairly and intelligently decide whether the indictment should have been quashed because it was not returned in the manner required by law. (*U. S.* v. *Bullock*, 448 F. 2d 728).

In fact, in *Bullock* the Court of Appeals recognized that the Constitution of the United States requires that defendants "have access to some method of substituted proof to ascertain that the substantive provisions of Fed. R. Crim. P.6(f) were met." Section 112-4(c) of the Illinois Criminal Code is identical with Fed. R. Crim. P.6(f) — both require the concurrence of 12 grand jurors for a true bill. The hearing ordered by the trial court in *Bullock* and in this case was specifically intended to provide that method of "substituted proof" — required because there was no transcript of the relevant grand jury proceedings. Therefore, the same constitutional right to present "substituted proof" should be accorded defendants here.

To prohibit such a hearing under these circumstances will encourage and reward prosecutors for defeating and negating the cited Discovery Rules by going "off the rec-

ord" when that serves his purpose but might arm the accused with a rightful defense.

Judicial progress, from abolition of the Star Chamber to promulgation of this court's Discovery Rules, has been based on the primacy of individual rights and due process over secrecy of proceedings. That philosophical hallmark of Anglo-American jurisprudence is now rejected and every man is deprived of the protection from oppressive authority for which our courts and the grand jury have been established. See *In Re Russo* 10 Crim. Law Reporter 2145, decided October 10, 1971.

2. THE TRUE MEANING OF SECTION 112-6(b)

We fear the court may have been misled by the Suggestions filed herein by the Special Prosecutor (p. 20-21) into relying on the Committee Comments under Section 112-6(b). (S.H.A. Chap. 38). As their title indicates, those Comments refer to the statute *as it existed in 1963*. They do not encompass the scope of the provision as it was rewritten in 1965. If the court was misled, we can understand its interpretation of 112-6(b). The very fact that the last sentence of those Comments says: "It may be doubted whether the legislature may so restrict the judiciary in its own procedures." suggests that the court surely must have been misled because, obviously, it would not have read into the present statute the same kind of unconstitutional restriction on judicial authority which required that statute to be amended to its present form in 1965.

If the court nevertheless still relies on those 1963 Committee Comments for its interpretation of present 112-6(b), we submit the following:

a. The purpose of the words "in the interests of justice" in the 1965 amendment of Section 112-6(b) was to

prevent "secrecy of the grand jury" being used as a shield to hide abuse of due process.

The same philosophy — concern for individual rights and due process rather than formalism — which led to this Court's Discovery Rules in 1971 prompted enactment of the relevant provision of Section 112-6(b) in 1965. That philosophy is negated by reliance upon an 1893 case (*Gitchell* v. *People*, 146 Ill. 175) and a 1910 case (*People* v. *Arnold*, 248 Ill. 169) to determine the meaning of a statute enacted more than 50 years later. That statute, when enacted, authorized the very procedure prohibited by those cases, in order to protect individual rights.

b. The court's interpretation of Section 112-6(b) is based on the fact that it does not contain the language of comparable Federal Rule Crim. Proc. 6(e) authorizing disclosure of grand jury proceedings upon a showing "that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Therefore, it is said that the Illinois statute is far narrower than the Federal Rule. However, the fundamental rule of statutory construction is that the absence of such limiting or qualifying language *broadens* or *liberalizes* statutory coverage.

c. The majority's construction of Section 112-6(b) is contrary to the intention of the legislature. As it stated: (1) in 1963 Section 112-6(b) "was concerned with the use of *transcripts* of grand jury proceedings for impeachment purposes at trial," and (2) Section 112-6(b) was amended in 1965 to overcome the basic constitutional objection that it gave the prosecutor absolute control over access to the testimony of witnesses before the grand jury for purposes of impeachment. As shown by the new language itself,

however, the 1965 amendment went far beyond curing that constitutional objection.

Section 112-6(b) now reads:

> "*Matters occurring* before the Grand Jury . . . may be disclosed when the court . . . directs such in the interests of justice." (Emphasis supplied).

Thus, disclosure is no longer restricted to transcripts of grand jury proceedings.

Rule 6(e) of the Federal Rules of Criminal Procedure is said to be the model for present 112-6(b). Section 112-6(b) is then said to be more restrictive than Rule 6(e) because it lacks the language of Rule 6(e) which expressly authorizes disclosure upon a showing "that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

A Calkins and Wiley law review article is cited in support of the proposition that the 1965 amendment was not intended by the legislature to permit the disclosure sought by defendants here. However, that amendment followed two attacks on the constitutionality of the 1963 statute by the same Calkins.*

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* One in the 1964 Northwestern Law Review (Vol. 59, p. 577, cited by the majority) and another in the January 1965 issue of the Michigan Law Review (Vol. 63, p. 455)

On May 5, 1965, Calkins testified before the Judiciary Committee of the Illinois House of Representatives as the author and proponent of House Bill 680 which amended 112-6(b) by enacting its present language. No other witness testified. That same day the committee unanimously approved the bill. It passed the House and Senate, without further hearing.

That construction is diametrically opposed to Calkins. He says that Section 112-6(b)'s ". . . provision concerning grand jury secrecy [is] substantially similar to Rule 6(e) of the Federal Rules of Criminal Procedure." (63 Mich. L. Rev. 487).

Calkins further states that:

> "Certainly, no policy of grand jury secrecy should impede a determination of constitutional questions"

and that:

> "A mere allegation that the jury was biased, or prejudiced, without some factual support, will unquestionably fail as a basis for obtaining disclosure. However, when the defendaant, through affidavits or otherwise, is able to establish good grounds for his motion to dismiss, as in the Beck case, disclosure should be permitted and further consideration given by the court. Denial of examination in the latter instance would give rise to serious abuse and would be a basic infringement upon a defendant's constitutional rights." (63 Michigan L. Rev. 475-6)

The constitutional objection which impelled the 1965 amendment is reinstated by restoring 112-6(b) to its 1963 meaning and allowing the prosecutor to control what grand jury material will be available to defendants by having no court reporter present to record the grand jury proceedings, by going "off the record," etc. This restoration also enables a prosecutor to thwart the rule of *Brady* v. *Maryland*, 373 U.S. 83 and (as shown above) this court's Discovery Rules.

d. The majority opinion is inconsistent with the plain meaning of this statute:

> "Matters occuring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in con-

nection with a judicial proceeding, directs such in the interests of justice."

Defendants' motion to dismiss herein is "preliminary to or in connection with a judicial proceeding . . ." The trial court has found "the interests of justice" require disclosure. Therefore, defendants' motion clearly fulfills the statutory requirement for disclosure of "matters occurring before the grand jury."

e. Prohibiting such disclosure contradicts this court's recognition of defendant's rights thereto, expressed in its June 23, 1971 opinion herein:

> "The Code of Criminal Procedure of 1963 clearly authorizes inquiry into the proceedings before the grand jury (sec. 114-I(9) and provides for disclosure of matters occurring before it, other than its deliberations and vote. (Sec. 112-6(b)." (49 Ill. 2d, 34).

f. The uniform series of cases requiring the procedure ordered by the trial court herein are minimized by calling those decisions "scattered and sporadic". Those adjectives in no way refute the logic or the constitutional compulsion of those decisions.

Significantly, no case is cited prohibiting the examination of grand jurors where, as here, that is the only method available to defendants to prove the prejudice caused them by the prosecutor's alleged misconduct before the grand jury.

One of the cases cited by defendants was *U. S.* v. *Wells*, 163 F. 313. The facts there are substantially identical with those in this case. In *Wells*, because of prosecutor misconduct before the grand jury, the court in 1908 authorized the same kind of hearing ordered by the trial court in this case. *U. S.* v. *Bruzgo*, 373 F 2d 383, is cited to criticize *Wells*.

as an "extraordinary" case, inferring that *Wells* is not good law. However, the court in *Bruzgo* said of *Wells*:

> ". . . we have no occasion here to quarrel with the case." (373 F. 2d 387).

Moreover, the fact that there are *not* countless reviewing court decisions in those jurisdictions shows there is no reason for the fear that such a hearing would work an undue burden on courts and the administration of justice by enabling trial of "some person other than the defendant, and some issue other than his guilt."

That same spectre has been raised in numerous cases, but those fears have not been realized. In fact, in a series of cases: *Griffin*, *Escobedo*, *Witherspoon* and (just last month) *Mayer*, the Supreme Court of the United States has rejected sacrificing individual rights because of established precedent or to avoid a strain on the judicial process. In any event, American courts do not protect individual rights to due process only when that is "convenient" or doesn't "strain" the administration of criminal justice.

g. The sufficiency of the showing made by defendants to warrant the hearing ordered by the trial court is not questioned. As the minority opinion (p. 9) recognized:

> "If affidavits charging such serious improprieties do not furnish a sufficient basis for the hearing ordered by the circuit court, then it is difficult to perceive the circumstances under which a hearing would be warranted."

In other words, if the showing made by defendants does not activate Section 112-6(b), nothing can. If the prosecutor misconduct alleged in the grand jurors' affidavits and statement does not constitute denial of due process, nothing does.

Where, as in Illinois, indictment can only be by grand jury, due process and equal protection of the law requires the jury be unbiased. (*U. S.* v. *Costello*, 350 U.S. 359, 363; *Colson* v. *Smith*, 315 F. Supp. 179; *Cassel* v. *Texas*, 339 U.S. 282). The majority cites *Costello*. However, the cited language from *Costello* relates to a challenge to that indictment *based on alleged inadequate or incompetent evidence* — not, as here, a challenge based on prosecutor misconduct causing a biased grand jury. The relevant language of *Costello* requires an indictment returned by an "*unbiased* grand jury." (350 U.S. 363). Where misconduct of a prosecutor is so extreme as to require a court to dismiss an indictment on the ground the grand jury was thereby biased, a court's failure to do so constitutes violation of the due process and equal protection clauses of the Constitutions of Illinois and the United States.

Moreover, Section 112-6(b), as construed to preclude any remedy for the wrong done defendants is similarly unconstitutional. (*People* v. *Glenn*, 173 N.Y. 395) Article I, Section 12 of the 1970 Illinois Constitution guarantees such a remedy:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy or reputation. He shall obtain justice by law, freely, completely and promptly."

The constitutional defect created by the majority's construction of Section 112-6(b) can be cured if this court construes Section 114-1(a)(5) to enable dismissal of an indictment "because of matters occurring before the grand jury" as does Fed. Rules Crim. Proc. 6(e).

h. This court also bases its interpretation of Sec. 112-6(b) on *People* v. *Gitchell*, supra. However, as shown by that court's opinion, under the facts of this case, even *that*

court would have provided the hearing ordered by the trial court herein:

> "*We find nothing in the record to indicate that there was any improper conduct on the part of the prosecuting attorney before the grand jury.* He may be present to give advice, to interrogate witnesses, to draw such bills as the jurors are prepared to find, and to give such general instructions as they may require, *but he is not to influence or direct them in respect of their findings; nor ought he to be present when they are deliberating upon the evidence*, or when their vote is taken." (Emphasis supplied) (146 Ill. 187)

Thus, because the prosecutor's misconduct charged here violates that prohibitory language, Gitchell itself requires reversal of the majority opinion!

i. The court also relies on *People* v. *Arnold*, supra. However, only *part* of the paragraph in that opinion relating to *Gitchell* is quoted. The very next sentence and remainder of that paragraph show that *Arnold* actually requires *reversal* of the majority opinion.

Arnold was a rape case. A motion to quash was made on the ground that the 15 year old victim was accompanied in the grand jury room by her mother and father. The trial court refused to quash the indictment and the Supreme Court upheld that decision, saying:

> "*What occurred [before the grand jury] was proved, however, by other witnesses*, and there was no substantial violation of the rule. The father was in the grand jury room at a time when some clothes that had been used were identified, for the alleged reason that the girl was timid and unable to appear alone in respect to a matter of that kind; but there was practically no examination of witnesses in the presence of each other. *There could have been no prejudice to the*

defendant from anything that occurred before the grand jury, and the court did not err in refusing to quash the indictment." (Emphasis supplied) (248 Ill. 172)

Thus, the facts in *Arnold* have absolutely no similarity to the facts here. In *Arnold* the court found, "There could have been no prejudice to defendant from anything that occurred before the grand jury," but prejudice to defendants by what occurred before the grand jury is the whole basis of the issue before *this* court.

Equally important, in *Arnold* the court found that what had occurred before the grand jury was proved by other witnesses. Thus, if any harm had been done the defendant before the grand jury in *Arnold*, the court recognized there was a remedy available to him to right that wrong.

In this case, though, there is no grand jury transcript covering important phases of the special prosecutor's alleged misconduct before the grand jury. Therefore, what occurred before the grand jury can *not* be proved by other witnesses here; such proof must come from the grand jurors themselves. Consequently, *Arnold* is clearly *not* precedent for the proposition that grand jurors cannot testify about matters, otherwise unprovable, occurring before the grand jury. In fact, a fair reading of *Arnold* shows it supports the trial court's decision here — because due process requires *some* method of proving prejudice to the defendants occurring before the grand jury.

j. Defendants have charged that submission of the indictment to the grand jury *before* it had deliberated and voted was, *in itself*, prejudicial to defendants and a denial of due process, in that it was tantamount to a direction to the grand jurors that they indict the defendants. There certainly is nothing "highly technical" about that argument. It merely seeks to require due process before the

grand jury. (*Bullock* v. *U. S.*, supra). Due process requires that, at the very least, defendants have some method of showing whether the grand jury *was* prejudiced by that act of the special prosecutor.

Defendants also charged that the grand jurors were inevitably prejudiced by (1) their presence in court at the special prosecutor's invitation when he challenged the presiding judge's supervisory authority over the grand jury and was held in contempt of court; (2) the published and broadcast reports of those court proceedings — all favoring the special prosecutor; (3) the published and broadcast reports labelling defendants' legal proceedings as "political" and designed to defeat the grand jury process; (4) the special prosecutor's reading some of the prejudicial reports into evidence before the grand jury; and, (5) the psychological compulsion" generated by the massiveness of such publicity itself.

These facts distinguish *Beck* v. *Washington*, 364 U.S. 541 and are equivalent to those in *Sheppard* v. *Maxwell*, 384 U.S. 333. Therefore, due process and equal protection of the law require, at the very least, that defendants should have the hearing ordered by the trial court to determine whether the grand jury was in fact prejudiced thereby.

3. VINDICATION BY TRIAL ON THE MERITS.

The majority says:

> "An innocent person will not be hurt by being forbidden to thus go behind the indictment, for he can always vindicate himself in a trial upon the merits."

However, 6 months ago this very court found the opposite to be true:

> "Nor do we find persuasive the argument that a defendant wrongfully indicted has his day in court

> at trial, and assuming vindication by acquittal has not been harmed thereby. We agree with the statement in In re Fried (2d cor.), 161 F.2d 453, that a wrongful indictment inflicts substantial harm on a defendant not entirely remedied by acquittal." (People v. Sears, supra, 36).

If the opportunity to establish one's innocence in a trial on the merits is all that due process requires — as is now suggested, then all motions to dismiss or to suppress evidence, identification, etc., should likewise be abandoned or denied. In the landmark cases referred to above (2f) the Supreme Court of the United States has never held availability of trial sufficient to excuse denial of due process prior thereto.

In America, wholly aside from the availability of trial, an accused has a *prior* right: to be charged in the manner — and only in the manner — required by the law. He can be brought to trial only *after* that has been established. That is the crux of this case to date: defendants' claim they have not been charged "according to law" by a valid indictment. This court's opinion of June 23, 1971 was right in recognizing that the stain of indictment is indelible and is not removed by subsequent acquittal, as is ironically shown by the *Chicago Sun-Times* editorial statement published December 9, 1971:

> "Even if the indictment against him [Hanrahan] is dismissed, he still will be under an ethical, if not legal, cloud."

Other grave and injurious consequences have already been caused by this challenged indictment and cannot be undone by trial. In practical fact then acquittal at trial does not necessarily cure the damage done the defendants herein.

The only possibility of erasing that wrongful stain is by holding the hearing ordered by the trial court. Fairness to everyone concerned: the public, the defendants and even the special prosecutor himself, requires a determination of whether this indictment was lawfully obtained.

WHEREFORE, defendant prays that the majority opinion be reversed and that this Court authorize the hearing ordered by the trial court.

In the alternative, defendant prays that such hearing be held *in camera* with the grand jury as a body, as provided by this Court in its June 23, 1971 opinion and approved by the majority herein.

Respectfully submitted,

s/ LEONARD R. HARTENFELD
Leonard R. Hartenfeld

s/ EDWARD V. HANRAHAN.
Edward V. Hanrahan

s/ CAMILLO F. VOLINI
Camillo F. Volini

s/ JOHN O. TUOHY
John O. Tuohy

Attorneys for Respondent Edward V. Hanrahan.

CERTIFICATE OF SERVICE

I certify that I caused to be served copies of the attached Petition for Rehearing and Notice on each person to whom it is directed on January 6, 1972 in accordance with court rules.

s/ CAMILLO F. VOLINI
Attorney.